Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA and NORTON SIMON ART FOUNDATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Ninth Circuit Court of Appeals invoked this Court's decision in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) and the foreign affairs field preemption doctrine to render unconstitutional a California statute extending the statute of limitations for claims to recover Nazi-looted artworks. In so doing, the court misconstrued *Garamendi* and extended the rarely-utilized dormant foreign affairs power well beyond this Court's holding in *Zschernig v. Miller*, 389 U.S. 429 (1968). The Ninth Circuit's decision raises exceptionally important issues for resolution by this Court.

1. In enacting a state statute extending the statute of limitations applicable to claims for the recovery of property stolen during the Holocaust against museums and galleries, was the State of California addressing an area of "traditional state responsibility" without intruding on the federal foreign affairs power?

2. Is a state statute extending the statute of limitations for the recovery of property stolen during the Holocaust, which does not conflict with any federal statute, treaty or policy, preempted by the federal foreign affairs power to make and resolve war?

3. Is the decision of the Ninth Circuit in direct conflict with this Court's prior decisions because it found California Code of Civil Procedure § 354.3 facially unconstitutional when the application to the case at bar poses no constitutional infirmity?

LIST OF PARTIES

Petitioner Ms. von Saher is an individual residing in Connecticut.

Respondents Norton Simon Museum of Art at Pasadena and Norton Simon Art Foundation are both California public benefit corporations.

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OPINIONS AND ORDERS BELOW

The Ninth Circuit's January 14, 2010 Order Amending Opinion and Denying the Petitions for Rehearing and for Rehearing En Banc and Amended Opinion is reported at 592 F.3d 954 (9th Cir. 2010) and reprinted in the Appendix at 1a-38a. The Ninth Circuit's August 19, 2009 Opinion affirming the District Court's holding that Cal. Code Civ. Proc. § 354.3 is unconstitutional is reported at 578 F.3d 1016 (9th Cir. 2009) and reprinted in the Appendix at 39a-74a. The Opinion of the District Court granting Respondents' motion to dismiss is not reported in F. Supp. 2d, and is reprinted in the Appendix at 75a-83a.

BASIS FOR JURISDICTION

The order of the Ninth Circuit Court of Appeals was entered on August 19, 2009. A timely petition for rehearing and rehearing en banc was denied on January 14, 2010. The petition for certiorari was filed within ninety days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

As the constitutionality of a California statute is at issue, and neither the State nor any agency, officer or employee thereof is a party hereto, 28 U.S.C. § 2403(b) may apply, and this petition will be served upon the Attorney General of the State of California. There is no indication on the court docket that the United States District Court for the Central District of California certified to the State Attorney General the fact that the constitutionality of a California statute was drawn into question. The California Attorney General appeared as Amicus Curiae in both the District Court and the Court of Appeals in support of the California statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of Cal. Code Civ. Proc. § 354.3 is set forth in the Appendix at 91a. The relevant text of Article I, Sections 8 and 10, Article II, Section 2, Article VI and the Tenth Amendment of the United States Constitution are set forth in the Appendix at 84a-90a.

STATEMENT OF THE CASE

The state statute at issue, California Code of Civil Procedure § 354.3, extended the statute of limitations applicable to actions against museums and galleries for the recovery of Nazi-looted art. Although the Ninth Circuit expressly found that § 354.3 does not conflict with any specific federal statute, treaty or policy, thus distinguishing it from the statute at issue in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the court, relying on *Garamendi* and the fact that the California legislature did not limit the scope of § 354.3 to museums and galleries physically located in California, nevertheless incorrectly held that the state had no "traditional state interest" in enacting § 354.3 and that the statute intruded upon the Federal Government's power to make and resolve war in violation of the foreign affairs field preemption doctrine recognized in *Zschernig v. Miller*, 389 U.S. 429 (1968). In so doing, the Ninth Circuit extended the field preemption doctrine recognized in *Zschernig* beyond the limitations set for that case in subsequent decisions. In *Garamendi*, the Court put off a reexamination of *Zschernig* to another day. The decision of the Ninth Circuit in *Von Saher* makes it necessary for the Court to reexamine *Zschernig* and the field preemption doctrine in order to determine its proper contours.

Not only is it clear that § 354.3 does not implicate or intrude upon federal power, but, quite the contrary, it is plain that the enactment of the statute is consistent with the Federal Government's policy. It has long been the express position of the United States that property looted during the Holocaust era should be returned to its rightful owners and the possessors of such artworks should be discouraged from asserting technical defenses, such as the statute of limitations, so that claims to these artworks may be judged upon their merits. Review by the Supreme Court is, therefore, critical because the Ninth Circuit's decision interferes with the Federal Government's position with respect to the return of Nazi-looted art and the power of states to regulate statutes of limitations consistent with that position.

Finally, it is important to underscore that, in this case, the respondents and the art in question are physically located in California. The Ninth Circuit, therefore, failed to apply this Court's longstanding rule that a statute should not be struck down as facially unconstitutional when a suitable limiting construction is available.

The California Statute At Issue

The California Legislature has recognized the unique nature of claims for the return of artworks looted during World War II ("WWII") and the roadblocks that make pursuing these claims so difficult. Those who seek legal redress for the theft of artworks during WWII must engage in detailed investigations, often in several countries, obtain translations of foreign historical documents and seek the assistance of legal and historical

experts, among other things, all of which may take many years to complete. Seeking the return of looted artworks also inevitably forces victims and their heirs to relive the horrors associated with that era. Claimants are often thwarted in their efforts to regain their property because present day possessors resort to statutes of limitations and other technical defenses despite undeniable proof of an earlier Nazi confiscation.

As a result, in 2002 the California Legislature exercised its traditional role of providing limitations periods by unanimously enacting § 354.3 to extend the statute of limitations for claims for the return of Nazi-looted artworks brought in California against museums or galleries. This modification of the statute of limitations prevents museums and galleries — which should know the importance of provenance and are in the best position to discover whether an artwork they are acquiring is among the thousands looted during WWII — from taking advantage of a technical defense to a meritorious claim for the return of stolen artworks.

The Nazi-Looted Artworks In The Possession Of A California Museum

This action was brought by petitioner, Marei von Saher, to recover an extraordinary pair of life-size paintings entitled "Adam" and "Eve" by Lucas Cranach the Elder (the "Cranachs"). The Cranachs are currently on display at the Norton Simon Museum of Art at Pasadena. App. 8a.

Ms. von Saher is the sole living heir of the noted Jewish art dealer, Jacques Goudstikker. It is undisputed

that following the Nazi invasion of the Netherlands in May 1940, the Nazis, led by Reichsmarschall Hermann Göring, looted Goudstikker's gallery of more than one thousand artworks, including the Cranachs, which he took for his personal collection. App. 9a.

After WWII, the Cranachs, along with other artworks stolen from Goudstikker's gallery, were recovered by the Allies and, in accordance with Allied policy, returned to the Netherlands with the expectation that they would be restituted to their rightful owner. Although Goudstikker's widow did recover some works, the Dutch government retained the Cranachs and other artworks looted by Göring. App. 9a-10a.

In 1961, Georges Stroganoff-Scherbatoff ("Stroganoff") claimed that the Cranachs had belonged to his family and that the Dutch government did not have any right, title or interest in them. In fact, the Cranachs came from the Church of the Holy Trinity in Kiev, and Goudstikker purchased them at an auction in 1931. They had never been part of the Stroganoff family art collection. Nevertheless, in 1966 the Dutch government sold the Cranachs to Stroganoff. App. 9a-10a.

In or about 1971, the Norton Simon Museum of Art at Pasadena and/or the Norton Simon Art Foundation (collectively, the "Museum") acquired the Cranachs either from Stroganoff or from an art dealer acting as Stroganoff's agent. The Cranachs have apparently been in the possession of the Museum since that time. Ms. von Saher discovered that the Cranachs were on display at the Museum in or about November 2000. Although

Ms. von Saher repeatedly demanded that the Museum return the Cranachs to her, and agreed to a tolling of the statute of limitations while the parties pursued voluntary mediation, the Museum refused to do so.

Ms. von Saher has recovered other works from her family's looted art collection, including hundreds of works returned by the Dutch Government. In 2001, the Dutch Government determined that its post-War policies respecting the restoration of Nazi-looted property had been too formal and bureaucratic and that, going forward, it would review claims for such property based upon a more policy-oriented approach. Following this policy change, on February 6, 2006, the State Secretary of the Dutch Government's Ministry for Education, Culture and Science, decided to restitute 200 artworks looted from Goudstikker to Ms. von Saher. The State Secretary specifically found:

> that grounds for restitution exist in this particular case in accordance with the committee's recommendation. In so doing I am especially mindful of the facts and circumstances relating to the involuntary loss of property . . . . With regard to the 'Göring transaction', the Restitutions Committee concludes that Goudstikker had suffered involuntary loss of possession, since the rights to those works were never waived. . . . Accordingly, it recommends that the application for restitution be granted. I hereby adopt this recommendation.

If the Cranachs had still been in the custody of the Dutch Government in 2006, they, too, would have been returned.

The Decisions Below

Ms. von Saher filed her complaint in the United States District Court for the Central District of California on May 1, 2007. It sets forth causes of action for replevin and conversion, damages under Cal. Penal Code § 496, a judgment declaring Ms. von Saher to be the lawful owner of the Cranachs, and to quiet title. The complaint alleges that it was timely brought pursuant to § 354.3. The District Court had subject matter jurisdiction over the claims pursuant to federal diversity jurisdiction under Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1332, as the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and there is complete diversity of citizenship between petitioner, a Connecticut citizen, and respondents, who are both California citizens.

The District Court granted the Museum's motion to dismiss the complaint with prejudice. Likening § 354.3 to a different California statute that, *inter alia*, extended the statute of limitations to bring claims for slave and forced labor against companies for whom that labor was performed during WWII, or their successors, the District Court held that § 354.3 "intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims," and is therefore unconstitutional. App. 81a-82a (citing *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003)). The District Court also held that, in the absence of § 354.3, Ms. von Saher's predecessor-in-interest had

only three years under California's traditional statute of limitations to bring a claim from the time the Museum acquired the Cranachs in 1971, irrespective of when Ms. von Saher or her predecessor-in-interest discovered their whereabouts. App. 82a.

On appeal, the Ninth Circuit determined that § 354.3 does not conflict with any specific federal statute, treaty or policy. App. 19a. The majority concluded, however, that because § 354.3 could apply to museums and galleries located outside of California, the Legislature's interest in enacting § 354.3 was not to protect its residents and regulate its art trade, but rather to create "a world-wide forum for the resolution of Holocaust restitution claims," which it held was not a "traditional state responsibility." App. 23a-25a. Having found that California was not exercising a traditional state function, the majority determined that § 354.3 was preempted by the foreign affairs power reserved to the Federal Government because the intent of the statute was to rectify wartime wrongs.[1] App. 26a-27a. Significantly, the court conceded that, had § 354.3 been limited to museums physically located in California, the state would have been acting within its traditional competence, foreign affairs field preemption would be inapplicable, and § 354.3 would have been constitutional. App. 23a.

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1. The Ninth Circuit reversed so much of the District Court decision as held that Ms. von Saher's claims would also be barred under California's traditional statute of limitations for actions to recover stolen property and granted her leave to amend her complaint to allege timeliness under Cal. Code Civ. Proc. § 338. App. 35a.

REASONS FOR GRANTING THE PETITION

Having found that § 354.3 "does not . . . conflict with any current foreign policy espoused by the Executive Branch" (App. 19a), the majority in *Von Saher* nevertheless concluded that *Garamendi* required a finding that § 354.3 did not address an area of "traditional state responsibility" and was "therefore subject to a field preemption analysis." App. 25a. The court misconstrued *Garamendi*'s analysis of "traditional state responsibility." Among other things, the *Von Saher* majority failed to recognize that the *Garamendi* decision was based on a clear and substantial conflict between "express federal policy" and the state statute, and the dictum concerning the strength of the state's interest did not in any way suggest that the state had no legitimate interest in enacting § 354.3 solely because its purpose was to "provide relief to Holocaust victims and their heirs." App. 22a.

In straining to analogize the asserted state interest underlying § 354.3 with the *Garamendi* dictum, and then seeking to justify field preemption under *Zschernig*, the Ninth Circuit declared unconstitutional a statute well within California's traditional competence by divining a legislative intent belied by the legislative record and incorrectly finding that it was preempted by the federal war power. In so doing, the decision in *Von Saher* has taken from the states the right to modify their own statutes of limitations, merely because the modification touches upon the subject of the Holocaust and applies to both resident and out-of-state defendants, even where there is no federal statute, treaty or policy in conflict with the state statute.

The *Von Saher* majority not only misconstrued *Garamendi*, but also took foreign affairs field preemption farther than any other decision, including both *Garamendi* and *Zschernig*. The Ninth Circuit's decision depends heavily on the continued validity, indeed upon the expansion of, the dormant foreign affairs doctrine given life in *Zschernig*, a case previously thought moribund or applicable only in limited circumstances. It is critical that this Court once and for all settle the question of the continued vitality of a broad foreign affairs field preemption, especially now that the Ninth Circuit has opened the door to an expansion of that doctrine, putting into jeopardy California's effort to deal with Nazi loot found in museums in or doing business in the state, and also stymieing other states from making similar efforts.

Moreover, the Ninth Circuit's decision actually conflicts with the express federal policy with respect to the restitution of looted Holocaust property. If left in place, the decision will have the inevitable effect of thwarting that policy and preventing other states from assisting the U.S. in effectuating it. The clearly enunciated position of the United States is that "artworks displaced during the 1933-1945 period should be returned to rightful owners," *see* J. Christian Kennedy, Special Envoy for Holocaust Issues, *The Role of the United States in Art Restitution*, Remarks at the Conference in Potsdam, Germany (April 23, 2007), http://germany.usembassy.gov/kennedy_speech.html; and that possessors of such property should be discouraged from asserting statutes of limitations and other technical defenses to prevent or impede the resolution of claims for the return of such property. *Id.*; *see also* Stuart E.

Eizenstat, Head of U.S. Delegation to the Prague Holocaust Era Assets Conferences, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference*, Prague Conference on Holocaust Era Assets, Czech Republic (June 28, 2009), http://www.state.gov/p/eur/rls/rm/2009/126158.htm. Thus, it is critical that this Court review the Ninth Circuit's decision in order to prevent its negative impact on these federal pronouncements.

Finally, given the Ninth Circuit found § 354.3 would be constitutional if limited only to defendants physically located within the state, it was improper for it to rule the statute facially unconstitutional. Proper application of Supreme Court jurisprudence requires that only any unconstitutional application of the statute be enjoined, leaving the remainder of the statute — applicable to the case at bar — intact.

I. By Misconstruing *Garamendi* And The Legislative History Of § 354.3, The Ninth Circuit Wrongly Concluded That § 354.3 Does Not Address A Traditional State Responsibility

In order to justify its finding that California had no legitimate state interest in enacting § 354.3, the Ninth Circuit misconstrued *Garamendi* and mischaracterized the enactment of § 354.3 as an effort to "create[] a world-wide forum for the resolution of Holocaust restitution claims." App. 25a. The majority made clear that, had § 354.3 been limited to museums and galleries physically located in California, there would be no question that the Legislature had been acting within its legitimate state interest. App. 23a. Thus, based solely on the fact

that § 354.3 could apply to a museum outside of California, the Ninth Circuit found, not that California had a weakened interest, but that it had no traditional state interest at all in enacting § 354.3.

Any reasonable reading of § 354.3, however, recognizes that it can apply only to museums and galleries subject to California's jurisdiction. App. 36a-37a. If, as the *Von Saher* majority concluded, California "has a legitimate interest in regulating the museums and galleries operating within its borders, and preventing them from trading in and displaying Nazi-looted art" (App. 23a), it has an equally legitimate interest in regulating museums and galleries that come into California to transact business, thereby subjecting themselves to California's jurisdiction. Thus, California's traditional state interest is well served by § 354.3.

A. *Garamendi* Did Not Hold Or Suggest That A State's Legitimate Interest In Enacting Legislation Is Nullified By A Concern for Holocaust Victims

The question in *Garamendi* was whether California's Holocaust Victim Insurance Relief Act ("HVIRA") "interferes with the National Government's conduct of foreign relations." *Id.*, 539 U.S. at 401. HVIRA required life insurance companies doing business in California to disclose information regarding their policies and related entity policies issued before and during the Nazi era. This Court held that HVIRA directly conflicted with the presidential policy expressed in the July 2000 Agreement Concerning the Foundation "Remembrance, Responsibility, and Future," 39 Int'l

Legal Materials 1298 (2000), that all issues relating to Holocaust-era insurance policies were to be resolved exclusively through the International Commission on Holocaust-Era Insurance claims ("ICHEIC"). *Garamendi*, 539 U.S. at 421 ("As for insurance claims in particular, the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information."). The Court held that the conflict between HVIRA and the presidential policy determination to resolve Holocaust insurance issues through ICHEIC was so clear that, regardless of the strength or weakness of the state interest, the former must yield to the latter.

In *Von Saher*, however, the Ninth Circuit, after embarking on an analysis of express U.S. pronouncements, found that there was no actual conflict between § 354.3 and any federal law, treaty or policy. The Ninth Circuit, relying on a footnote in *Garamendi*,[2] then concluded that § 354.3 could only be held unconstitutional on the basis of the foreign affairs field preemption doctrine, but that the doctrine could only be applied if the court first found that California had "no serious claim to be addressing a traditional state responsibility" in enacting § 354.3. App. 24a (quoting *Garamendi*, 539 U.S. at 419 n.11).

2. The *Garamendi* Court stated that "field preemption might be the appropriate doctrine" if the state were to act on a matter of foreign policy without any claim to be addressing a traditional state responsibility. *Id.*, 539 U.S. at 419 n.11. As shown in Point II below, California did not "take a position on a matter of foreign policy," *id.*, but merely modified a statute of limitations to apply to claims in California courts.

By erroneously relying on dictum in *Garamendi*, the majority determined that California had no legitimate state interest in extending the statute of limitations for the recovery of stolen Holocaust property merely because that statute applied to non-resident defendants that were subject to jurisdiction in the state, as well as those physically located within the state. Having concluded that the application of the field preemption doctrine was justified, the Ninth Circuit found § 354.3 unconstitutional because it intruded on the Federal Government's war power.

Garamendi provides no support for the Ninth Circuit's conclusion that California acted outside of its legitimate competence in enacting § 354.3. In *Garamendi*, this Court concluded that, since HVIRA involved a limited disclosure about a small number of policies written by foreign insurers more than 60 years ago, it did not aid in the general evaluation of corporate reliability in contemporary insuring. The state insurance commissioner's contention that HVIRA was a typical "blue sky" disclosure regulation was, therefore, disingenuous and evidenced a weak state interest. The *Garamendi* Court never suggested, however, that the fact that the state's true interest was to aid Holocaust victims abolished or weakened the state's interest. Rather, the Court concluded that the state's concern for its Holocaust victims did not overcome the weakness of its interest in imposing its insurance regulations upon entities (European affiliates of California companies) and transactions (insurance policies written in Europe between European parties) having no connection with the state. Put simply, HVIRA had the effect of regulating those entities and transactions, irrespective of whether

California had any contacts with them, solely on the basis of the existence of an uninvolved California affiliate.[3]

In *Von Saher*, the Ninth Circuit concluded that California had a stronger interest in enacting a statute that dealt with the problem of Nazi-looted art hanging on the walls of museums and galleries in the state than it did in enacting HVIRA, but found that the legitimate state interest disappeared because the statute also applied to claims against non-resident museums and galleries. But that finding is in no way compelled by *Garamendi*. Indeed, none of the concerns that troubled the Court in *Garamendi* are present in *Von Saher* because there is no regulation at stake in *Von Saher* and § 354.3 will only come into play once jurisdiction over a defendant is otherwise established. There is no chance of indirect regulation of entities not subject to California's legislative authority. Claims for the recovery of Nazi-looted art could always be brought against non-resident entities, so long as they were subject to California's jurisdiction, and § 354.3, which applies even handedly to all claims, as every statute of limitations, does nothing more than extend the time in which to do so.

3. The *Garamendi* court also asked what the result would be if vindicating the rights of Holocaust victims was, in and of itself, a powerful state interest and concluded that, it would still have to give way to the Federal Government's greater interest in vindicating the rights of victims throughout the country. Of course, a weighing of the state's interest as against the federal interest would not yield the same result in *Von Saher*, and indeed the Ninth Circuit found no such conflict. In *Garamendi*, HVIRA threatened the efficacy of the federal policy decision to support ICHEIC. In *Von Saher*, § 354.3 aids the Federal Government's express policy. Revising state statutes of limitations to permit the resolution of Holocaust property claims on the merits is not a different way of achieving the federal goals; on the contrary, it is a vital tool in the realization of that policy.

Thus, there is no basis in *Garamendi* to support a finding that California did not have a strong interest in enacting § 354.3, much less a finding that in enacting the statute, California was not acting within "an area of traditional state responsibility," a finding that the Ninth Circuit used to justify its inquiry into field preemption. But even if it could be said that the concern for Holocaust victims somehow weakened the state's legitimate interest in enacting § 354.3, under *Garamendi* (*id.*, 539 U.S. at 419 n.11) that would have led only to an analysis as to whether there is an actual conflict with express federal policy of a "clarity or substantiality" that compels the state statute to yield. *Id.* The Ninth Circuit, however, found that there was no conflict at all with any federal treaty, agreement or policy, and there was therefore no basis for conflict preemption. And that should have been the end of the inquiry.

B. The Express Legislative Intent Of § 354.3 Puts It Well Within California's Traditional State Interest

Section 354.3 was amended during the legislative process to cover museums and galleries outside of California. The majority surmised that this amendment demonstrated that the Legislature's intent was not to "regulat[e] the museums and galleries operating within its borders" — an admittedly legitimate state interest — but rather to create a "world-wide forum" for Holocaust restitution claims. There was no need, however, for the majority to guess the Legislature's intent. The actual legislative history is clear. Notes prepared for the April 9, 2002 hearing of the Assembly Committee on Judiciary state:

> As currently drafted, AB 1758 would apply only to a suit by a Holocaust victim to recover

artwork from a museum or gallery located in California. Attorney E. Randol Schoenberg, who represents a client in an action[4] to recover artwork taken in the Holocaust, has written to suggest the removal of the limitation of the bill to apply only in those cases involving museums and galleries in the state. Mr. Schoenberg states:

> For some reason, the proposed legislation is limited in application to museums or galleries "located in the State of California." This territorial limitation in section 354.7(a) should be eliminated. Jurisdiction over defendants in California courts is already restricted by the Constitution of California and of the United States, as set forth in Code of Civil Procedure Section 410.10 .... None of the other statute of limitation sections have jurisdictional limits on the location of defendants to whom the limitations rule applies.

Limitations of Actions: Holocaust Victims, AB 1758 (2002) at 5, *available at* http://info.sen.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1758_cfa_20020408_124547_asm_comm.html.

Further, notes prepared for the June 25, 2002 hearing of the Senate Judiciary Committee state:

> With regard to out-of-state defendants, the limits of a California court's jurisdiction would

4. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

> be determined by the "minimum contacts" test set forth by the U.S. Supreme Court in *International Shoe Co. v. Washington* (1945) 326 U.S. 310. . . . "Minimum contacts" means the relationship is such that the exercise of jurisdiction over the nonresident does not offend "traditional notions of fair play and substantial justice." Indeed, the doing of business within a state creates such a relationship as to make it reasonable for the state to require that the corporation defend suits brought against it there."
>
> In California, Witkin writes: "To justify the court's assumption of jurisdiction, the defendant's activity must consist of some act or transaction in the forum state 'by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.'" [2 Witkin, California Procedure, Jurisdiction (4th Ed. 1996), p. 158] . . . .
>
> Museums for which the test was satisfied would find their collections subject to recovery regardless of whether the piece of artwork itself had ever entered California. This result, however, would not be that different from corporations that find their out-of-state assets subject to a state judgment.

Limitation of Actions: Holocaust-Era Artwork, AB 1758 (2002) at 5-6, *available at* http://info.sen.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1758_cfa_20020626_092521_sen_comm.html.

Thus, the legislative history of § 354.3 demonstrates that the actual intent was to exercise the legitimate state interest of regulating entities that avail themselves of the privilege of transacting business in California and not to provide a world-wide forum for war reparations.

Just as the regulation of property is a traditional state function, the establishment of a statute of limitations for conversion of stolen property is quintessentially a traditional state function. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Thus, § 354.3, which gives a plaintiff no cause of action that she did not previously have, but merely extends the time in which claims for stolen property can be asserted, addresses a traditional state responsibility. Indeed, California certainly has an interest in determining when an action by any victim of theft can be brought in order to recover stolen property and, where the statute of limitations is found to be inadequate with respect to claims for the recovery of Nazi-looted art, California certainly has an interest in and a right to modify its statute of limitations to correct that inequity.

The *Von Saher* decision leads to an anomaly that requires action by this Court. Possessors of Nazi-looted art are permitted to rely upon state statutes of limitations to avoid claims for restitution, and courts are bound to apply those state statutes, but according to the Ninth Circuit, the states that enacted these statutes are no longer able to change them. The state created the statute of limitations for conversion that applies in all cases where plaintiffs seek the recovery of stolen

property, including property stolen during the Holocaust, and this statute of limitations can be raised as a defense by all defendants, including non-resident defendants properly subject to jurisdiction in California. In its wisdom, California concluded that the statute of limitations in cases for the recovery of Nazi-looted property should be extended. Under *Von Saher*, however, defendants will be able assert the California statute of limitations, but California is without power to determine the length of the applicable statute of limitations, creating an improper and irrational limitation. The court's mistaken analysis of traditional state responsibility may well impede the enactment of similar statutes in other states.

It was illogical for the Ninth Circuit to conclude that by not limiting the statute's reach to resident defendants, the legislature somehow obliterated its admittedly legitimate state interest in regulating the statute of limitations in cases properly before its courts. It goes without saying that even if the statute had been so limited, the courts would still be in the position of resolving restitution claims arising out of WWII. So, it appears that the Ninth Circuit's concern was not really one of federal power, but rather, one of state policy, and that should most certainly be left to the legislature.

II. The Ninth Circuit Has Taken Foreign Affairs Field Preemption Farther Than Permitted Under The Supreme Court's Decisions In *Zschernig* And *Garamendi*

A. Even If A Field Preemption Inquiry Had Been Warranted, There Would Be No Basis For The Ninth Circuit's Holding That § 354.3 Was Preempted By The Foreign Affairs Power

Having erroneously found that § 354.3 did not address a legitimate state interest, the Ninth Circuit embarked upon a field preemption analysis. But even if it were appropriate to apply the foreign affairs field preemption doctrine to a statute that addresses a legitimate state interest, the Ninth Circuit erred in its conclusion that § 354.3 is unconstitutional because it was enacted "with the aim of rectifying wartime wrongs committed by our enemies," and therefore is an intrusion into the Federal Government's exclusive power to make and resolve war. App. 26a. In this respect, the decision impermissibly expanded the doctrine of field preemption far beyond the prior holdings of this Court.

As Judge Pregerson of the Ninth Circuit pointed out in his dissent, § 354.3 does not target former enemies of the United States. The Federal Government does not make or resolve war with museums and galleries, the only entities at issue under § 354.3. App. 37a-38a. As Judge Pregerson also noted, § 354.3 does not provide for war reparations against a foreign government that looted artworks; it merely provides a statute of limitations for proceeding against a museum or gallery currently in possession of Nazi-looted art. App. 37a-38a. Notably, in *Alperin v. Vatican Bank*, the Ninth Circuit found that

"[r]eparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution." *Id.*, 410 F.3d 532, 551 (9th Cir. 2005). This decision simply cannot be reconciled with the Ninth Circuit's decision in *Von Saher* that a statute of limitations for property stolen during wartime is preempted by the Constitution's commitment of war reparations to the Federal Government.

Contrary to the Ninth Circuit's conclusion, providing relief to Holocaust victims does not necessarily involve the resolution of war or invoke foreign affairs. Not every statute that furnishes relief to Holocaust victims is the equivalent of extracting reparations from wartime enemies. Indeed, since the Ninth Circuit found § 354.3 unconstitutional because it aims to rectify war wrongs, the seventeen state statutes that toll statutes of limitations during wartime[5] may also be at risk as these statutes could apply to foreign defendants. In fact, there are numerous state statutes that provide relief to Holocaust victims without implicating war reparations. For example, at least eleven states provide tax relief for Holocaust victims,[6] nineteen states have mandatory Holocaust education statutes,[7] and various states have other miscellaneous

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5. *See, e.g.*, Cal. Code Civ. Proc. § 354 (2010); Ky. Rev. Stat. § 413.300 (2009); Minn. Stat. § 541.15(a)(3) (2010); N.Y. C.P.L.R. § 209 (2010); N.C. Gen. Stat. § 1-34 (2009).

6. *See, e.g.*, Cal. Rev. & Tax Code §§ 17131.1 & 17155 (2010); Conn. Gen. Stat. §§ 1-11 & 12-701 (2009); Ind. Code Ann. § 6-3-1-30 (2010); Va. Code Ann. § 58.1-322 (2010).

7. *See, e.g.*, Cal. Ed. Code §§ 44776.2 & 51220 (2010); Conn. Gen. Stat. § 10-16b (2009); Fla. Stat. § 1003.42 (2010); O.C.G.A. § 50-12-130 (2009); 105 ILCS 5/27-20.3 (2010); Ind. Code Ann. § 20-30-5-7 (2010); Nev. Rev. Stat. Ann. § 233G.010 (2009).

Holocaust-related legislation.[8] Plainly, the majority interpreted § 354.3 far too broadly, finding that a statute that provides relief to Holocaust victims in the form of a revised statute of limitations equates to war reparations. The Ninth Circuit's decision in *Von Saher* leaves open to attack any state statute that provides relief to Holocaust victims as an impermissible intrusion upon the Federal Government's foreign affairs power.

Not only does § 354.3 have no bearing upon the federal war powers, a state statute extending the statute of limitations in cases to recover Nazi loot from the present possessors is in line with — indeed, a necessary corollary of — the position that the United States has consistently taken with respect to the restitution of Nazi-looted art: artworks looted by the Nazis should be identified and returned to their pre-War owners. *See Proceedings of the Washington Conference on Holocaust-Era Assets* (J.D. Bindenagel ed. 1999), *available at* http://www.state.gov/www/regions/eur/holocaust/heac.html; Stuart E. Eizenstat, *Imperfect Justice* 192-99 (2003); Kennedy, *The Role of the United States in Art Restitution*. But the United States has never implemented specific procedures to effectuate this position. Rather, it has left the victims to locate their property, make claims, try to resolve those claims through negotiation, and when they cannot do so, have the matter resolved in court. Kennedy, *The Role of the United States in Art Restitution*.

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8. *See, e.g.*, Estates and Trusts — Share of Other Heirs, Fla. Stat. § 732.103 (2010); Malicious Harassment, Wash. Rev. Code § 9A.36.078 (2009).

A critical component of this consistent U.S. position is that possessors of Nazi-looted art should be discouraged from asserting the statute of limitations and other technical defenses to prevent or impede the resolution of Holocaust claims on the merits. Indeed, in June 2009, when representatives of 46 countries (including the U.S.) met in Prague at a Holocaust-era assets conference, the head of the U.S. delegation, Ambassador Stuart Eizenstat, in his opening remarks addressed the critical issue of the statute of limitations in the context of the recovery of Nazi-looted art:

> I am also concerned by the tendency of holders of disputed art to seek refuge in statutes of limitation and laches defenses in order to block otherwise meritorious claims even in situations where the claimant has not been provided with provenance information. Given the nature of the Holocaust and the Cold War that followed, many families simply were unaware or only partially aware of their heritage. The difficulty in getting documentation and the uncertain nature of the current restitution process creates further uncertainty. For a defendant to take advantage of circumstances totally beyond the control of the claimant compounds the grotesque nature of the original crime.

Eizenstat, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference.*

At the conclusion of the Prague Conference, the participating nations, including the United States, adopted the *Terezin Declaration on Holocaust Era Assets and Related Issues*, which among other things urged "all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims. . . ." *Terezin Declaration* (June 30, 2009), http://www.state.gov/p/eur/rls/or/126162.htm. But the Federal Government has neither sought — nor indicated any intent to seek — the enactment of legislation at the federal level. Rather it has left to the states — through the exercise of their traditional state responsibility — the task of enacting legislation limiting the assertion of technical defenses in actions to recover property looted during the Holocaust, thereby allowing such claims to be heard on the merits.

The *Von Saher* decision, by striking down such a state statute, is in direct conflict with this express U.S. policy and, ironically, will have the effect of chilling efforts in other states to pass legislation critical to effectuate the Federal Government's dual goals of favoring the return of Holocaust property to the families of the victims from whom it was stolen and promoting the resolution of such claims on the merits.[9]

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9. Indeed, the *Von Saher* decision will encourage possessors of Nazi-looted art to seek refuge behind the statute of limitations, exactly what the Federal Government wishes to

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B. *Zschernig* And The Dormant Foreign Affairs Doctrine Should Be Reexamined In Light Of The *Von Saher* Decision

The dormant foreign affairs doctrine provides that states may not legislate in areas implicating foreign affairs, whether or not the Federal Government has acted with respect to the issue at hand. This doctrine springs from the Court's decision in *Zschernig*, 389 U.S. at 434-35. In *Zschernig*, Oregon's inheritance statute prohibited residents of foreign countries from inheriting from an Oregon estate unless the foreign government involved granted reciprocal rights and the inheritance would be free from confiscation. The Oregon statute thus invited the courts to delve into, and ultimately criticize, those governments — primarily communist bloc countries — under the guise of examining reciprocity and confiscation, and was, therefore, unconstitutional.

(Cont'd)

avoid. For example, in *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009), *reh'g en banc granted*, 590 F.3d 981 (9th Cir. 2009), a case involving Nazi-looted art that was subsequently purchased by Spain in 1993, the defendants argued that rehearing on the issue of whether prudential exhaustion should be read into the Foreign Sovereign Immunities Act should not have been granted, solely on the grounds that the case would have to be dismissed anyway because it is time-barred under the *Von Saher* decision. *See* Appellants-Defendants Kingdom of Spain and Thyssen-Bornemisza Collection Foundation's Response to Order to File Simultaneous Briefs as to Whether the Matter Should Be Heard En Banc, *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009) (Nos. 06-56325 and 06-56406) (*available at* http://www.commartrecovery.org/docs/CassirervKingdomofSpain091027.pdf).

In *Von Saher*, the Ninth Circuit has taken foreign affairs field preemption farther than *Zschernig* and its progeny. *See Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1184 (E.D. Cal. 2007) ("[o]ther courts addressing the application of field preemption under *Zschernig* to situations where the conflict between state law and federal foreign policy is less clear than in *Garamendi* have shown reluctance to extend the [sic] *Zschernig*'s reach further.").

Zschernig, to the extent it has been applied by other courts, has been limited to those cases where states enact what amount to embargos or boycotts against foreign countries, the aim of which is to criticize policies of those governments and force political change. *See Cruz v. United States*, 387 F. Supp. 2d 1057, 1076 (N.D. Cal. 2005) (citing, *e.g. Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (striking down tax provision which encouraged boycott of South Africa); *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom., Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (invalidating statute restricting state agencies from purchasing goods or services from companies doing business with Burma); *Tayyari v. N.M. State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980) (striking down policy of excluding Iranian students in retaliation for hostage crisis).)

As the district court noted in *Central Valley*, the state statutes that the Court invalidated in *Zschernig, Crosby*, and *Garamendi* were all "aimed directly at a foreign country" and were "aimed directly at some aspect of that foreign country's conduct that was the subject of United States foreign policy activity." *Central*

Valley, 529 F. Supp. 2d at 1188. The same can be said for the statute invalidated by the Ninth Circuit in *Deutsch* as only particular foreign countries used slave labor during WWII. *Id.*, 324 F.3d at 703-04.

Section 354.3 is not aimed at any foreign countries at all. It is completely neutral in its application to any museum or gallery in possession of Nazi-looted art, whether that museum be located in California, another state, an allied country or a former wartime enemy. It is aimed at museums in possession of looted art without regard to how the museum came to be in possession. If there should ever be an occasion where § 354.3 is applied to a museum or gallery located in a foreign country because the facts in that case would permit California to assert jurisdiction over that entity, the effect on foreign affairs would be purely incidental just as in any case where jurisdiction over foreign entities can be obtained. But, even *Zschernig* recognizes that a statute must have more than an incidental effect to conflict with the foreign affairs power. *Id.*, 389 U.S. at 434-435. Indeed, it appears that the instant case is the only one to apply the foreign affairs field preemption doctrine set forth in *Zschernig* to invalidate a statute that is not "aimed directly at a foreign country." *Central Valley*, 529 F. Supp. 2d at 1188.

Four members of the Court dissented in *Garamendi*, finding that the presidential policy of deference to the ICHEIC was not a sufficiently clear conflict with California's state law to warrant preemption. *Id.*, 539 U.S. at 430. The dissent particularly noted: "We have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here." At least to the four

dissenters, *Zschernig* and the notion of "dormant foreign affairs preemption" may survive only when the state acts to criticize a foreign government. *Garamendi*, 539 U.S. at 439 (Justice Ginsburg, joined by Justice Stevens, Scalia, and Thomas, dissenting). Indeed, even the majority in *Garamendi* struggled with *Zschernig* and turned to the concurring and dissenting opinions in that decision to analyze the scope of foreign affairs field preemption.

Far from affirming *Zschernig*, *Garamendi* is seen as a limit on the broad dormant foreign affairs doctrine. *See* Perry S. Bechky, *Darfur, Divestment, and Dialogue*, 30 U. Pa. J. Int'l L. 823, 880 (2009) (*Garamendi* "f[e]ll short of endorsing *Zschernig*'s view of preclusive exclusivity"); Jeremy K. Schrag, Note, *Federal Framework for Regulating the Growing International Presence of the Several States*, 48 Washburn L.J. 425, 436-37 (2009) (*Garamendi* "arguably abandoned the broad approach established in *Zschernig*, which seemingly provided for a thick blanket of federal foreign affairs power"). Rather than struggling to rationalize *Zschernig*, as the majority did in *Garamendi*, we submit that it is time for the Court to recognize the confusion that *Zschernig* has caused and expressly limit its breadth to state statutes that directly criticize foreign governments.[10]

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10. *Medellín v. Texas*, 552 U.S. 491 (2008) is seen as a further narrowing of the foreign affairs preemption doctrine upheld in *Garamendi*. In *Medellín*, the Court made clear that the preemptive effect given to the President's express policy of favoring the ICHEIC over state remedies in *Garamendi* was

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Here, where no foreign affairs policy or interest of Congress or the President can be identified, the Ninth Circuit relied solely on the broadest type of dormant foreign affairs preemption in holding that a statute of limitations, being applied by a California court to a California museum, is unconstitutional. In an effort to explain how a statute of limitations for the recovery of art in the possession of museums and galleries affects foreign affairs, and therefore falls within the *Zschernig* rubric, the Ninth Circuit concluded that "[i]n order to determine whether the Museum has good title to the Cranachs, a California court would necessarily have to review the restitution decisions made by the Dutch Government and courts." App. 28a. The fact remains, however, that in accordance with the Ninth Circuit's decision, Ms. von Saher can continue her lawsuit under the limitations provision provided by California's general statute of limitations,[11] and if she can establish that her claim is timely under that provision, a court in California will still have to review the Dutch Government's actions with respect to the Cranachs. Thus, it is not § 354.3

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based on "a narrow set of circumstances: the making of executive agreements to settle litigation claims between American citizens and foreign governments or foreign nationals" (*Medellin*, 552 U.S. at 531), and not upon a more sweeping recognition that the President's power to conduct foreign affairs preempts state law. *See* Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 331-32 (2009).

11. Petitioner was granted leave to amend her complaint to allege the lack of reasonable notice to establish diligence under Cal. Code Civ. Proc. § 338, the general statute of limitations for actions for the recovery of stolen property. App. 35a.

that would require California courts to review acts of restitution by foreign governments, but rather the particular facts in this case. Section 354.3's effect on foreign affairs is purely incidental, based upon unusual facts in a particular case and not upon the statute itself. Even under *Zschernig*, a statute must have more than an incidental effect on foreign affairs to conflict with the field of foreign affairs. *Id.* 389 U.S. at 434-35.

III. The Ninth Circuit Failed To Apply The Rule That A Statute Should Not Be Struck Down As Facially Unconstitutional When A Suitable Limiting Construction, Applicable In The Case At Bar, Is Available

"[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. Bartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Courts must not seek out conflicts between state and federal regulation where none clearly exists. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The Court should not speculate about the effects of a statute in hypothetical cases. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008).

In this case, the Ninth Circuit concluded that, had § 354.3 been limited to museums and galleries located

in California, there would be no question that the California Legislature had been acting within its traditional state interest, and § 354.3 would have been held constitutional. App. 23a. This leads to a most unusual circumstance. As this case is brought against a museum located in California, based upon the Ninth Circuit's logic, § 354.3 as applied here should not be unconstitutional.

A facial challenge to the constitutionality of a law can only succeed where it is established that no set of facts exists under which the Act would be valid. *Washington State Grange*, 552 U.S. at 449. When confronted with a constitutional flaw in a statute, the Supreme Court will "try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force[.]" *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006). The "'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise be left intact.'" *Id.* at 329 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985)).

In this case, the Ninth Circuit found that if § 354.3 were limited to museums and galleries physically located in the state, it would be constitutional. If this is correct, the proper remedy here would not be a finding of facial unconstitutionality, but rather an injunction against the unconstitutional application, leaving the application to museums and galleries in California — including Respondents — in place.

This remedy is particularly appropriate here, as § 354.3 was passed by a unanimous California Legislature and has received the support of California's Attorney General throughout these legal proceedings. A ruling of facial unconstitutionality in this case clearly "frustrates the intent of the elected representatives of the people" of California. *Ayotte*, 546 U.S. at 329; *Washington State Grange*, 552 U.S. at 451. Likewise, there can be no doubt that the California Legislature would prefer a partially intact § 354.3 that applies to museums and galleries located in California to no statute at all, given that the original bill for § 354.3 proposed such language. App. 23a-24a. *See Ayotte*, 546 U.S. at 330 (court must ask if legislature would prefer what is left of statute to no statute at all).

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER DATED JANUARY 14, 2010, AMENDING OPINION DATED AUGUST 19, 2009, AND DENYING THE PETITIONS FOR REHEARING AND FOR REHEARING EN BANC AND AMENDED OPINION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-56691.

Marei VON SAHER,

Plaintiff-Appellant,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA; Norton Simon Art Foundation,

Defendants-Appellees.

Argued and Submitted Dec. 8, 2008.
Filed Aug. 19, 2009.
Amended Jan. 14, 2010.

Before: HARRY PREGERSON, D.W. NELSON and DAVID R. THOMPSON, Circuit Judges.

Opinion by Judge THOMPSON; Dissent by Judge PREGERSON.

Appendix A

ORDER AMENDING OPINION AND DENYING THE PETITIONS FOR REHEARING AND FOR REHEARING EN BANC AND AMENDED OPINION

ORDER

The panel, with the following amendments, has granted the petition for panel rehearing filed by the appellee, Norton Simon Museum of Art at Pasadena, and has denied the petitions for rehearing and for rehearing en banc filed by the appellant Marei Von Saher, and by amici the State of California and Earthrights International.

The opinion filed August 19, 2009, slip op. 11333, and published at 578 F.3d 1016 (9th Cir. 2009) is amended as follows:

At page 578 F.3d at 1031 the last two paragraphs of the majority opinion are deleted. The first of these two paragraphs begins "The museum contends that the articles" and the last paragraph of the two paragraphs ends "dismissed without leave to amend." The following new paragraph is inserted in place of the two deleted paragraphs:

> Because it is not clear that Saher's complaint could not be amended to show a lack of reasonable notice, dismissal without leave to amend was not appropriate. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). We, therefore, grant

Appendix A

Saher leave to amend her complaint to allege the lack of reasonable notice to establish diligence under California Code of Civil Procedure § 338, and remand this case to the district court for that purpose.

The full court was advised of the petitions for rehearing and for rehearing en banc, and of the proposed amendments set forth above. No judge requested rehearing en banc.

The opinion as amended above is filed simultaneously with this order.

With the exception of the relief granted above pursuant to the appellee's petition for panel rehearing, the petitions for rehearing and for rehearing en banc are DENIED. Judge Pregerson voted to grant the petitions for rehearing and for rehearing en banc.

No further petitions for rehearing or rehearing en banc may be filed.

Appendix A

OPINION

THOMPSON, Senior Circuit Judge:

Marei von Saher ("Saher") seeks the return of two paintings alleged to have been looted by the Nazis during World War II. The paintings were purchased in or around 1971 by the Norton Simon Museum of Art in Pasadena, California ("the Museum"), and are now on display there. Saher brought this claim against the Museum under § 354.3 of the California Code of Civil Procedure, which extends the statute of limitations until 2010 for actions for the recovery of Holocaust-era art. The primary issue on appeal is whether § 354.3 infringes on the national government's exclusive foreign affairs powers. The district court held that it does. We agree, and affirm the district court's holding that § 354.3 is preempted.

California also has a three-year statute of limitations for actions to recover stolen property. California Code of Civil Procedure § 338. The district court granted the Museum's Rule 12(b)(6) motion to dismiss Saher's complaint under that statute without leave to amend. Because it is possible Saher might be able to amend her complaint to bring her action within § 338, we reverse the district court's dismissal without leave to amend, and remand for further proceedings.

Appendix A

I. Background

A. Nazi Art Looting in WWII

During World War II, the Nazis stole hundreds of thousands of artworks from museums and private collections throughout Europe, in what has been termed the "greatest displacement of art in human history." Michael J. Bazyler, Holocaust Justice: The Battle for Restitution in America's Courts 202 (N.Y.U Press 2003).

Following the end of World War II, the Allied Forces embarked on the task of returning the looted art to its country of origin. In July 1945, President Truman authorized the return of "readily identifiable" works of art from U.S. collecting points. *See, e.g.*, Presidential Advisory Commission on Holocaust Assets in the United States, Plunder and Restitution: The U.S. and Holocaust Victims' Assets SR-142 (Dec. 2000) (hereinafter Plunder and Restitution). At the Potsdam Conference, President Truman formally adopted a policy of "external restitution," under which the looted art was returned to the countries of origin—not to the individual owners. American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, Report, 148 (1946) (hereinafter Roberts Commission Report).

Despite these restitution efforts, many paintings stolen by the Nazis were never returned to their rightful owners. *See, e.g.*, Bazyler at 204. Tracking the provenance of Nazi-looted art is nearly impossible, since

many changes of ownership went undocumented, and most of the transactions took place on the black market. *Id.* In recent years, a number of the world's most prominent museums have discovered their collections include art stolen during World War II. *Id.* at 205-06.

The federal government has continued to take action to address the recovery of Holocaust-era art. In 1998, Congress enacted the U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611 (codified as amended at 22 U.S.C. § 1621). This Act established the Presidential Advisory Commission on Holocaust Assets, which conducted research on the fate of Holocaust-era assets, and advised the President on future policies concerning the recovery of these assets. *Id.* That same year, the State Department convened a conference with forty-four other nations to address the recovery of Holocaust-era assets. U.S. Dep't of State, Proceedings of the Washington Conference on Nazi-Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/23231.htm (hereinafter Washington Conference Proceedings). In the meantime, numerous Holocaust victims and their heirs have turned to the courts to recover their looted art. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004).

B. Section 354.3

Many obstacles face those who attempt to recover Holocaust-era art through lawsuits. The challenges range from procedural hurdles such as statutes of

limitations, to prudential standing doctrines. *See, e.g.*, Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 Houston L. Rev. 193, 213-28 (2006); Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 Williamette J. Int'l L. & Disp. Resol. 243, 252-58 (2006). In 2002, California responded to these difficulties by enacting California Code of Civil Procedure § 354.3.[1] Section 354.3 provides:

> Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity described in paragraph (1) of subdivision (a). Subject to Section 410.10, that action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

Section 354.3(b). The California statute allows suits against "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance." Section 354(a)(1). The statute also extends the statute of limitations for

1. All subsequent references are to the California Code of Civil Procedure, unless otherwise stated.

§ 354.3 claims until December 31, 2010. Section 354.3(c).

California has enacted several other laws extending the statute of limitations for claims relating to the Holocaust. *See, e.g.*, Section 354.5 (extending statute of limitations for insurance policy claims by Holocaust victims or their heirs); Section 354.6 (creating a cause of action and extending the statute of limitations for slave labor claims arising out of WWII). Both of these sister statutes have been found unconstitutional under the foreign affairs doctrine. *Steinberg v. Int'l Comm'n on Holocaust Era Ins. Claims*, 133 Cal. App. 4th 689, 34 Cal. Rptr. 3d 944, 953 (2005) (finding § 354.5 unconstitutional); *Deutsch v. Turner Corp.*, 324 F.3d 692, 716 (9th Cir. 2003) (finding § 354.6 unconstitutional).

C. The Cranachs

Saher, the only surviving heir of Jacques Goudstikker, a deceased art dealer, filed this suit in 2007 against the Museum under § 354.3 and California Penal Code § 496, seeking the return of a diptych entitled "Adam and Eve." The diptych, a pair of oil paintings by sixteenth-century artist Lucas Cranach the Elder (hereinafter the "Cranachs"), is currently on public display at the Museum.

Appendix A

Goudstikker bought the Cranachs at an art auction in Berlin in or about May 1931.[2] Goudstikker was a prominent art dealer in the Netherlands; he specialized in Old Master paintings. Goudstikker's collection contained more than 1,200 artworks, including Rembrandts, Steens, Ruisdaels, and van Goghs.

When the Nazis invaded the Netherlands in May 1940, Goudstikker and his family fled the country. The family left their assets behind, including the Gallery. Goudstikker brought with him a black notebook containing a list of over 1,000 of the artworks he had left behind in his collection (the "Blackbook"). The Blackbook lists the Cranachs as Numbers 2721 and 2722, and states that they were purchased at the Lepke Auction House and were previously owned by the Church of the Holy Trinity in Kiev.

After the Goudstikkers escaped, the Nazis looted Goudstikker's gallery. Herman Göring, Reischsmarschall of the Third Reich, seized the Cranachs and hundreds of other pieces from the gallery. Göring sent the artwork to Carinhall, his country estate near Berlin, where the collection remained until approximately May 1945 when the Allied Forces discovered it. The recovered artwork was then sent to the Munich Central Collection Point, where the works

2. The facts in this section are alleged in Saher's complaint; some are disputed by the Museum. Given the procedural posture of the case, we accept these factual allegations as true, and construe them in the light most favorable to Saher.

from the Goudstikker collection were identified. In or about 1946, the Allied Forces returned the Goudstikker artworks to the Netherlands.

The Cranachs were never restituted to the Goudstikker family. Instead, after restitution proceedings in the Netherlands, the Dutch government delivered the two paintings to George Stroganoff, one of the claimants, and he sold them, through an art dealer, to the Museum.

The Museum filed a Rule 12(b)(6) motion to dismiss Saher's complaint filed in this case for the return of the paintings. The district court granted the motion and dismissed Saher's claim with prejudice. The district court held that § 354.3's extension of the statute of limitations was unconstitutional on its face, because it violated the foreign affairs doctrine, as interpreted and applied by the Ninth Circuit in *Deutsch*, 324 F.3d 692. The district court concluded that by seeking to redress wrongs committed in the course of World War II, the California statute intruded on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims. The court then dismissed Saher's complaint because it had not been filed within the three-year period of California's statute of limitations, California Code of Civil Procedure § 338. This appeal followed.

Appendix A

II. Standard of Review

We review de novo the district court's decision dismissing Saher's complaint under Rule 12(b)(6). *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004). We accept all well-pleaded factual allegations as true, and construe them in the light most favorable to Saher. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L.Ed.2d 929 (2007); *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1122 (9th Cir. 2008).

III. Motion for Judicial Notice

The Museum moves for judicial notice of two Presidential Commission reports, a military order approved by President Truman and enacted under the command of General Eisenhower, and a memorandum prepared by a State Department committee. Judicial notice of legislative facts such as these is unnecessary. Fed. R. Evid. 201(a), advisory comm. note to 1972 amendments. *See, e.g., Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002) ("[J]udicial notice is generally not the appropriate means to establish the legal principles governing the case.").

The Museum also moves for judicial notice of the fact that various newspapers, magazines, and books have published information about the Cranachs. Courts may take judicial notice of publications introduced to "indicate what was in the public realm at the time, not whether the contents of those articles were in fact true."

Premier Growth Fund v. Alliance Capital Mgmt., 435 F.3d 396, 401 n.15 (3d Cir. 2006); *accord Heliotrope Gen. Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.l 18 (9th Cir. 1999) (taking judicial notice "that the market was aware of the information contained in news articles submitted by the defendants."). These publications meet the standards for admissibility set forth in Federal Rule of Evidence 201(b). Accordingly, we take judicial notice of them solely as an indication of what information was in the public realm at the time.

IV. Constitutionality of § 354.4 Under the Foreign Affairs Doctrine

The Supreme Court has characterized the power to deal with foreign affairs as a primarily, if not exclusively, federal power. *See, e.g., Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 413-14, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003); *Zschernig v. Miller*, 389 U.S. 429, 432, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S. Ct. 399, 85 L. Ed. 581 (1941). The Supreme Court has declared state laws unconstitutional under the foreign affairs doctrine when the state law conflicts with a federal action such as a treaty, federal statute, or express executive branch policy. *See, e.g., Garamendi*, 539 U.S. at 421-22, 123 S. Ct. 2374 (invalidating a California statute which conflicted with Presidential foreign policy); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-74, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (invalidating a Massachusetts statute which stood as an obstacle to a Congressional act imposing sanctions on Burma); *U.S. v. Belmont*, 301

U.S. 324, 327, 57 S. Ct. 758, 81 L. Ed. 1134 (1937) (holding that the Litvinov Assignment, an executive agreement, preempted New York public policy).

Occasionally, however, in the absence of any conflict, the Court has declared state laws to be incompatible with the federal government's foreign affairs power. *See, e.g., Zschernig*, 389 U.S. at 432, 88 S. Ct. 664 (striking down an Oregon probate law, in the absence of any federal action, because it was an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress"); *Hines*, 312 U.S. at 63, 61 S. Ct. 399 (invalidating a Pennsylvania immigration law because the field of immigration regulation was occupied exclusively by federal statutes and regulations); *see also Deutsch* 324 F.3d at 712 (concluding that § 354.6 infringed on the federal government's exclusive power to wage and resolve war).

The Museum argues that § 354.3 is preempted under either theory. First, the Museum contends, § 354.3 conflicts with the Executive Branch's policy of external restitution following World War II. Alternatively, the Museum argues, § 354.3 is preempted because it infringes on the federal government's exclusive power to conduct foreign affairs, and specifically, the power to redress injuries arising from war. We address each argument in turn.

A. Does § 354.3 Conflict With the Executive Branch's Policy of External Restitution?

Federal law's "power" to preempt state law arises from the Supremacy Clause, which provides that "the Laws of the United States" and "all Treaties. . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. Under a traditional statutory preemption analysis, conflict or obstacle preemption occurs where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (citing *Hines*, 312 U.S. at 67, 61 S. Ct. 399) (internal quotation marks omitted).

Executive agreements settling claims with foreign nations and nationals have long been accorded the same preemptive effect. *Garamendi*, 539 U.S. at 416, 123 S. Ct. 2374 ("[V]alid executive agreements are fit to preempt state law, just as treaties are[.]"); *Dames & Moore v. Regan*, 453 U.S. 654, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981); *United States v. Pink*, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942); *Belmont*, 301 U.S. at 324, 57 S. Ct. 758. In *Garamendi*, the Supreme Court invalidated a California statutory scheme which facilitated litigation of Holocaust-era insurance claims. *Garamendi*, 539 U.S. at 401, 123 S. Ct. 2374. The Court concluded that the California scheme posed an obstacle to the German Foundation Agreement and other expressions of Executive Branch policy preferring nonjudicial resolution of such claims. *Id.* at 405-07, 123 S. Ct. 2374.

Here, the Museum contends that § 354.3 is preempted by the Executive Branch's policy of external restitution. This policy, the Museum argues, was expressed in two main sources: first, the London Declaration, and second, "Art Objects in U.S. Zone," a U.S. policy statement approved by President Truman during the Potsdam Conference in August of 1945.

London Declaration

The United States and the Netherlands, along with sixteen other nations, were signatories to the London Declaration of January 5, 1943. Forced Transfers of Property in Enemy-Controlled Territory, 1943, in 3 Dep't of State, Treaties and Other International Agreements of the United States of America 1776-1949, p. 754 (C. Bevans comp. 1969) (hereinafter Bevans). The Declaration served as a "formal warning to all concerned, and in particular persons in neutral countries," that the Allies intended "to do their utmost to defeat the methods of dispossession practiced by the governments with which they [were] at war[.]" *Id.*

In the Declaration, the Allies explicitly reserved the right to invalidate wartime transfers of property, regardless of "whether such transfers or dealings [had] taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport[ed] to be voluntarily effected." *Id.* The Declaration does not explicitly address restitution or reparations, but has been credited by some with laying the foundation for the United States's postwar

restitution policy. *See, e.g.*, Plunder and Restitution at SR-139.

Art Objects in U.S. Zones

When the American forces entered Germany in the winter of 1944-45, they discovered large stashes of Nazi-looted art, hidden in castles, banks, salt mines, and even caves. Plunder and Restitution at SR-13, SR-85. U.S. authorities established several central collection points within the U.S. Zone to assemble the recovered artwork "for proper care and study." Report, Art Objects in U.S. Zone, July 29, 1945, NACP, RG 338, USGCC HQ, ROUS Army Command, Box 37, File: Fine Art [313574-575] (hereinafter "Art Objects in U.S. Zone").

On July 29, 1945, at the Potsdam Conference, President Truman approved a policy statement setting forth the standard operating procedures governing the looted artwork found within the U.S. zone of occupation. Art Objects in U.S. Zone; Roberts Commission Report at 148. The governments of the formerly occupied countries submitted consolidated lists of items taken by the Germans, with information about the location and circumstances of the theft. Plunder and Restitution at SR-142. The U.S. authorities examined the lists, and when artwork was identified, it was returned to the country of origin. *Id.* Under this policy of "external restitution," the U.S. restituted the looted artwork to countries, not individuals. Art Objects in U.S. Zone; Plunder and Restitution at SR-139-SR-142. The newly liberated governments were responsible for restituting

the art to the individual owners. Once the art was returned to the country of origin, the U.S. played no further role.

A contemporaneous memorandum from the State Department illuminates several of the reasons the federal government preferred the policy of external restitution over individual restitution. U.S. Dep't of State, Memorandum from Interdivisional Comm. on Rep., Rest., & Prop. Rights, Subcomm. 6, Recommendations on Restitution, Apr. 10, 1944, 1, NACP, RG 59, Lot 62D-4, Box 49, State/Notter, [320633-644] (hereinafter Recommendations on Restitution). First, in view of the complexities of the sham transactions through which the Nazis seized many of the artworks, the State Department felt it best to allow the individual countries to handle restitution in "whatever way they see fit." *Id.* at 2. Second, the State Department observed, in some cases, it might "be impossible to locate the original owners or their heirs and the governments involved will have to decide what should be done with the property or proceeds therefrom." *Id.* Finally, the State Department recognized that the liberated countries themselves had a stake in the restitution of art owned by their citizens:

> [I]n many, if not most, cases the local funds [with which the Nazis "purchased" the art from the persecuted] were supplied originally by the local government or central bank as occupation costs or through forced credits. The Germans in effect forced the local

> government to pay for their purchases. The individual owner received recompense in local currency but the country as a whole received no recompense for the transfer of property to foreign owners. These cases constitute looting just as much as the cases of outright seizure without recompense.

Id. at 2-3.

The U.S. authorities stopped accepting claims for external restitution of looted artwork as of September 15, 1948. Plunder and Restitution at SR-143. By the beginning of 1949, close to three million pieces of Jewish cultural property had been restituted to twelve different countries by the U.S. authorities. *Id.*

Had California enacted § 354.3 in 1945, it would have directly conflicted with the federal government's policy of external restitution. If the statute had been enacted in the immediate aftermath of the war, it would have presented a competing method of resolving restitution claims, and a forum for individuals to seek the return of their looted art—in clear contravention of the Executive Branch policy. The California statute also would have presented a direct threat to several of the goals underlying the Executive Branch's policy, including the rehabilitation of Germany.

The United States's policy of external restitution, however, ended in 1948. After September 15, 1948, the U.S. authorities refused to accept any more claims for

external restitution. Plunder and Restitution at SR-143. In fact, as Saher states in her complaint, the Cranachs were returned to the Netherlands through the U.S. external restitution program. Section 354.3 cannot conflict with or stand as an obstacle to a policy that is no longer in effect.

The Museum also argues, however, that many of the federal government's concerns leading to the external restitution policy remain relevant today. For example, the Museum argues that claims under § 354.3 are problematic, because they ask California courts to review the restitution decisions of foreign governments.[3] Even if true, there would still be no conflict because, as stated above, the external restitution policy is no longer in effect.

In sum, had the California statute been enacted immediately following WWII, it undoubtedly would have conflicted with the Executive Branch's policy of external resolution. The statute does not, however, conflict with any current foreign policy espoused by the Executive Branch.

B. In the Absence of Any Conflict With Federal Law or Foreign Policy, is § 354.3 Nonetheless Preempted Under the Foreign Affairs Doctrine?

At times, albeit seldomly, the Supreme Court has found a state law to be preempted because it infringes

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3. These and other related concerns are addressed more fully in the section below dealing with field preemption.

upon the federal government's exclusive power to conduct foreign affairs, even though the law does not conflict with a federal law or policy. *Zschernig*, 389 U.S. at 432, 88 S. Ct. 664; *Hines*, 312 U.S. at 63, 61 S. Ct. 399. In *Garamendi*, the Court suggested that a traditional statutory "field" preemption analysis should be employed in such cases:

> If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted, and if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S. Ct. 399, 85 L. Ed. 581 (1941).

Garamendi, 539 U.S. at 420 n.11, 123 S. Ct. 2374.

Unlike its traditional statutory counterpart, foreign affairs field preemption may occur "even in [the] absence of a treaty or federal statute, [because] a state may violate the Constitution by establishing its own foreign policy." *Deutsch*, 324 F.3d at 709 (internal citation and quotations omitted). The central question, then, is this: in enacting § 354.3, has California addressed a traditional state responsibility, or has it infringed on a foreign affairs power reserved by the Constitution exclusively to the national government?

Appendix A

1. Does § 354.3 Concern a Traditional State Responsibility?

Saher contends § 354.3 concerns a quintessential state function: the establishment of a statute of limitations for actions seeking the return of stolen property. Property, of course, is traditionally regulated by the state. But § 354.3 cannot be fairly categorized as a garden variety property regulation. Section 354.3 does not apply to all claims of stolen art, or even all claims of art looted in war. The statute addresses only the claims of Holocaust victims and their heirs. Section 354.3(b).

Courts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs. *See, e.g., Garamendi*, 539 U.S. at 425-26, 123 S. Ct. 2374 (rejecting purported state interest in regulating insurance business and blue sky laws); *Crosby*, 530 U.S. at 367, 373 n.7, 120 S. Ct. 2288 (rejecting purported state interest in taxing and spending); *Zschernig v. Miller*, 389 U.S. 429, 437-38, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968) (rejecting purported state interest in regulating descent of property); *Deutsch*, 324 F.3d at 707 (rejecting purported state interest in procedural rules).

The *Garamendi* Court in dicta rejected the "traditional state interests" advanced by California in support of HVIRA, finding instead that the real purpose of the state law was the "concern for the several thousand Holocaust survivors said to be living in the state." *Garamendi*, 539 U.S. at 426, 123 S. Ct. 2374. Though § 354.3 purports to regulate property, an area

traditionally left to the states, like HVIRA, § 354.3's real purpose is to provide relief to Holocaust victims and their heirs.

California's desire to help its resident Holocaust victims and their heirs is a noble legislative goal, with which we are entirely sympathetic. In *Garamendi*, however, the Supreme Court held that "California's concern for the several thousand Holocaust survivors said to be living in the state . . . does not displace general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction, under which the State's claim is not a strong one." *Garamendi*, 539 U.S. at 426-27, 123 S. Ct. 2374. The State's interest alone was not sufficient in *Garamendi* to save the statute: "[T]here being about 100,000 survivors in the country, only a small fraction of them live in California. As against the responsibility of the United States of America, the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy." *Id.*

California arguably has a stronger interest in enacting § 354.3 than it did in enacting the related statutes struck down in *Deutsch* and *Garamendi*. Section 354.3 addresses the problem of Nazi-looted art currently hanging on the walls of the state's museums and galleries. Assem. Jud. Com., Background Information Worksheet for Assem. Bill No. 1758 (2001-2002 Reg. Sess.) Jan. 30, 2002.

California certainly has a legitimate interest in regulating the museums and galleries operating within its borders, and preventing them from trading in and displaying Nazi-looted art. Indeed, it appears the original goal of § 354.3 may have been to regulate California museums and galleries in such a manner. Prior to its enactment, however, the bill was amended. The restriction limiting the scope of the statute to suits against "museums and galleries in California" was stricken. Assem. Amend. to Assem. Bill No. 1758 (2001 - 2002 Reg. Sess.); Sen. Jud. Com., Analysis of Assem. Bill No. 1758 (2001-2002 Reg. Sess.) Jun. 25, 2002, pp. 5-6. As enacted, the statute allows suits against "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance," whether located in the state or not. Section 354.3(a)(1).

The scope of the statute as enacted belies California's purported interest in protecting its residents and regulating its art trade. The amended version of § 354.3 suggests that California's real purpose was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the state. A memorandum from the Governor's office provides further illustration of California's intent. In it, California is characterized as a pioneering leader in the quest for justice for Holocaust victims:

> In the past decade, it has come to the public's attention that spoils gained by the Nazi

> Holocaust were enjoyed not just by the Nazis. *California has been a leader in exposing those entities* who benefitted financially from the plunder or exploited the unusual circumstances of the Holocaust, who have been less than forthcoming in their business dealings.

Governor's Office of Planning & Research, Enrolled Bill Report on Assem. Bill No. 1758 (2001-2002) Reg. Sess. Aug. 1, 2002 (emphasis added).

By opening its doors as a forum to all Holocaust victims and their heirs to bring Holocaust claims in California against "any museum or gallery" whether located in the state or not, California has expressed its dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of Word War II. In so doing, California can make "no serious claim to be addressing a traditional state responsibility." *Garamendi*, 539 U.S. at 419 n. 11, 123 S. Ct. 2374; *see also Deutsch*, 324 F.3d at 712 (rejecting California's interest in "redress[ing] wrongs committed in the course of the Second World War"). California cannot have a "distinct juristic personality" from that of the United States when it comes to matters of foreign affairs. *Pink*, 315 U.S. at 232, 62 S. Ct. 552. When it comes to dealings with foreign nations, "state lines disappear." *Belmont*, 301 U.S. at 331, 57 S. Ct. 758.

In sum, the scope of § 354.3 belies any purported state interest in regulating stolen property or museums or galleries within the State. By enacting § 354.3,

California has created a world-wide forum for the resolution of Holocaust restitution claims. While this may be a laudable goal, it is not an area of "traditional state responsibility," and the statute is therefore subject to a field preemption analysis. *See Garamendi*, 539 U.S. at 419 n.11, 123 S. Ct. 2374.

2. Does the California Statute Intrude on a Power Expressly or Impliedly Reserved to the Federal Government by the Constitution?

The District Court held that § 354.3 intrudes on the power to make and resolve war, a power reserved exclusively to the federal government by the Constitution. We agree.

The Constitution divides the war power between the Executive, who is the Commander-in-Chief of the Armed Forces, and the Congress, who has the power to declare war. U.S. Const. art. II, § 2; *Id.* at art. I, § 8. *Deutsch* clearly provides that "[m]atters related to war are for the federal government alone to address," and state statutes which infringe on this power will be preempted. *Deutsch*, 324 F.3d at 712.

Section 354.3 establishes a remedy for wartime injuries. The legislative findings accompanying the statute repeatedly reference the "Nazi regime," "Nazi persecution," and "the many atrocities" the Nazis committed. 2002 Cal. Legis. Serv. 332 (West 2002). By enacting § 354.3, California "seeks to redress wrongs

committed in the course of the Second World War" — a motive that was fatal to § 354.6. *Deutsch*, 324 F.3d at 712.

Section 354.3 was closely modeled on § 354.6, which was found to infringe on the federal government's exclusive power to make and resolve war. Sen. Rules Com., Off. of Sen. Floor Analyses, 3d. reading analysis of Assem. Bill No. 1758 (2001-2002 Reg. Sess.) Aug. 8, 2002. Like its sister statute struck down in *Deutsch*, § 354.3 "creates a special rule that applies only to a newly defined class" of plaintiffs. *Id.* Like § 354.6, § 354.3 creates a new cause of action "with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection." 324 F.3d at 708. This is significant because, as the *Deutsch* Court noted, [a] state is generally more likely to exceed the limits of its power when it seeks to alter or create rights and obligations than when it seeks merely to further enforcement of already existing rights and duties." 324 F.3d at 708.

Saher, however, argues that § 354.3 is distinguishable from the statute at issue in *Deutsch*, because it does not target former wartime enemies. Section 354.3 authorizes suits only against museums and galleries, but the actionable injury at the heart of the statute is the Nazi theft of art. The California legislature enacted § 354.6 "with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection." *Deutsch*, 324 F.3d at 708. California enacted § 354.3 with the same

verboten intent. Distinctions between the class of eligible defendants are irrelevant in light of this fatal similarity.

Saher also contends that under *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), claims for restitution of "garden variety property" can be distinguished from claims for reparation arising from wartime injury. In *Alperin* we considered whether the claims for restitution presented by a class of Holocaust survivors presented a nonjusticiable political question. Saher places particular reliance on the following quote: "Reparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution." *Alperin*, 410 F.3d at 551. This quote references the first *Baker* test, which requires courts to consider whether the case in question concerns an issue that has been textually committed by the Constitution to another branch of government. *Id.* at 544, 549-52 (citing *Baker v. Carr*, 369 U.S. 186, 210-11, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)). Ultimately, in *Alperin* we concluded that despite the political overtones inherent in cases brought by Holocaust survivors, the underlying property issues presented in such cases were not political questions constitutionally committed to the political branches. *Id.* at 551.

Saher's reliance on *Alperin* is misplaced. Our holding that the judiciary has the power to adjudicate Holocaust-era property claims does not mean that states have the power to provide legislative remedies for these claims. Here, the relevant question is whether the power

to wage and resolve war, including the power to legislate restitution and reparation claims, is one that has been exclusively reserved to the national government by the Constitution. We conclude that it has.

Section 354.3, at its core, concerns restitution for injuries inflicted by the Nazi regime during Word War II. Claims brought under this statute, including the instant claim, would require California courts to review acts of restitution made by foreign governments. For example, in this case, the parties contest the provenance of the Cranachs. In order to determine whether the Museum has good title to the Cranachs, a California court would necessarily have to review the restitution decisions made by the Dutch government and courts. This example illustrates that § 354.3 claims cannot be separated from the Nazi transgressions from which they arise.

Our conclusion today is buttressed by the documented history of federal actior addressing the subject of Nazi-looted art. The Art Looting and Investigation Unit of the Office of Strategic Services gathered a great deal of intelligence about looted art through covert operations during and after the war. Plunder and Restitution at SR-92. Immediately following the war, the federal government implemented the program of external restitution, as discussed in more detail above. It is beyond dispute that there was no role for individual states to play in the restitution of Nazi-looted assets during and immediately following the war.

Appendix A

Recent Administrations and Congresses continue to address problems facing Holocaust survivors and their heirs. *See, e.g.*, Pub. L. No. 105-186, June 23, 1998, 112 Stat. 611, codified at 22 U.S.C. § 1621 (establishing the Presidential Advisory Commission on Holocaust Assets in the United States); Plunder & Restitution, supra (the final report of the Presidential Advisory Commission on Holocaust Assets in the United States); U.S. Dep't of State, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/23231.htm (hereinafter Washington Principles). (adopted by the forty-four governments participating in the Washington Conference on Holocaust-Era Assets, hosted by the State Department on December 3, 1998). This history of federal action is so comprehensive and pervasive as to leave no room for state legislation. *Cf. English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990) (discussing traditional statutory field preemption).

Finally, the federal government, "representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines*, 312 U.S. at 63, 61 S. Ct. 399. The recovery of Holocaust-era art affects the international art market, as well as foreign affairs. Many have called for the creation of an international registration system, and a commission to settle Nazi-looted art disputes. *See, e.g.*, Pollock, 43 Houston L. Rev. at 231. Only the federal government possesses the power to negotiate and establish these or other remedies with the international community. As

discussed above, the federal government has initiated discussions with other countries, which will hopefully yield a comprehensive remedy for all Holocaust victims and their heirs. *See, e.g.*, Washington Conference Report. No organization comparable to the International Commission on Holocaust Era Insurance Claims has been established yet to resolve Holocaust-era art claims. This does not, however, justify California's intrusion into a field occupied exclusively by the federal government.

In sum, it is California's *lack* of power to act which is ultimately fatal. In *Deutsch*, we held that "[i]n the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes." *Deutsch*, 324 F.3d at 714. California may not improve upon or add to the resolution of the war. *Id.* The factual circumstances surrounding this case — the many years which have passed since Göring stole the Cranachs from Goudstikker, restitution of the paintings to the Netherlands by the Allies, or the changes in ownership since then — cannot save § 354.3 from this fatal flaw.

V. Did the District Court Err in Concluding that Saher's claim was Time-Barred Under California Code of Civil Procedure § 338?

Though Saher cannot bring her claim under § 354.3, she may be able to state a cause of action within the three-year statute of limitations of § 338. The district court held that Saher's § 338 claim was time-barred, because she did not inherit her interest in the Cranachs until after the statute of limitations on the claim had expired. The claim, however, might survive a Rule 12(b)(6) motion to dismiss depending upon how Saher might be able to allege the notice element.

A. Constructive Notice

At the time the museum acquired the Cranachs, around 1971, § 338 provided a strict three-year statute of limitations. Cal. Civ. Proc. Code § 338(3).[4] In 1982, the section was amended to incorporate a discovery rule: "[T]he cause of action in the case of theft, as defined in § 484 of the Penal Code, of any art or artifact is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft."[5] Cal. Civ. Proc. Code

4. In 1988, § 383(3) was renumbered § 383(c); all subsequent references refer to subsection (c) for simplicity's sake. 1988 Cal. Legis. Serv. 1186 (West).

5. In 1989, the phrase "art or artifact" was replaced with "article of historical, interpretive, scientific, or artistic significance." Cal. Civ. Proc. Code § 338(c) (West 1989).

§ 338(c); 1982 Cal. Legis. Serv. 3401 (West). Saher does not claim that the 1982 amendments should be applied to her case. Rather, she contends that the statute of limitations on her claim did not begin to run until she discovered that the Cranachs were in the possession of the museum.

Decisions from California's intermediate appellate court have reached differing conclusions as to when the statute of limitations under § 338 begins to run for property stolen prior to 1983. In *Naftzger v. American Numismatic Society*, the court held that a cause of action for the return of property stolen before the 1982 amendment "accrue[s] when the owner discovered the identity of the person in possession of the stolen property, and not when the theft occurred." 42 Cal. App. 4th 421, 49 Cal. Rptr. 2d 784, 786 (1996). The *Naftzger* court concluded that "there was a discovery rule of accrual implicit in the prior version of section 338." 49 Cal. Rptr. 2d at 786. In *Society of California Pioneers v. Baker*, however, the court held that prior to the 1982 amendments, "the statute of limitations began to run anew against a subsequent purchaser." 43 Cal. App. 4th 774, 50 Cal. Rptr. 2d 865, 869-70 (1996). *The Pioneers* court specifically noted its disagreement with *Naftzger*. 50 Cal. Rptr. 2d at 870 n.10.

The California Supreme Court has not addressed the issue, but "has, however, specifically held that the discovery rule, whenever it applies, incorporates the principle of constructive notice." *Orkin v. Taylor*, 487

F.3d 734, 741 (9th Cir. 2007) (citing *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d. 1103, 1109, 245 Cal. Rptr. 658, 751 P.2d 923 (1988)). Thus, in *Orkin*, we concluded that "under the discovery rule, a [pre-1983] cause of action accrues when the plaintiff discovered *or reasonably could have discovered* her claim to and the whereabouts of her property." *Id.* at 741.

Saher argues, however, that the *Naftzger* court adopted a discovery rule based on actual, not constructive, notice. As we pointed out in *Orkin*, such a rule would be clearly inconsistent with California Supreme Court precedent. *Id.* (citing *Jolly*, 44 Cal. 3d at 1109, 245 Cal. Rptr. 658, 751 P.2d 923).

Saher urges that we certify the issue to the Supreme Court of California for resolution. Though Saher contends that the Orkin court's interpretation of California state law is incorrect, "it is well established that we may reconsider earlier Ninth Circuit precedent only by en banc review or after an intervening Supreme Court decision." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1285 (9th Cir. 1992) (declining to revisit the court's interpretation of New York state law under similar circumstances). Under *Orkin*, we are bound to apply a constructive notice standard.

In conclusion, Saher's cause of action began to accrue when she discovered or reasonably could have discovered her claim to the Cranachs, and their whereabouts. *Orkin*, 487 F.3d at 741.

B. Reasonable Diligence

The Museum asserts that Saher is precluded as a matter of law from making the required showing of reasonable diligence, because the facts underlying her claim were publicly available. We disagree.

A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by the applicable statute of limitations only when "the running of the statute is apparent on the face of the complaint." *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006). "[A] complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Supermail Cargo, Inc. v. U.S.*, 68 F.3d 1204, 1206 (9th Cir. 1995).

In *Orkin*, we concluded that the plaintiffs' claims were time-barred because the face of the complaint established facts that foreclosed any showing of reasonable diligence. *Orkin*, 487 F.3d at 742. The Orkins' complaint admitted that the defendant had purchased the painting in question at a publicized auction, and that she was listed as the owner in a publicly available catalogue raisonné. *Id.* at 741-42. By contrast, there are no facts on the face of Saher's complaint which foreclose a showing of lack of reasonable notice as a matter of law.

Because it is not clear that Saher's complaint could not be amended to show a lack of reasonable notice,

dismissal without leave to amend was not appropriate. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). We, therefore, grant Saher leave to amend her complaint to allege the lack of reasonable notice to establish diligence under California Code of Civil Procedure § 338, and remand this case to the district court for that purpose.

VI. Conclusion

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part. The case is **REMANDED** for further proceedings consistent with this opinion.

PREGERSON, Circuit Judge, dissenting in part:

I dissent from the majority's conclusion that California is acting outside the realm of traditional state responsibility, and that field preemption applies. Where a State acts within its "traditional competence," the Supreme Court has suggested that conflict preemption, not field preemption, is the appropriate doctrine. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n. 11, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003). *Garamendi* counsels that field preemption would apply "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility. . . ." *Id.* That is not the case here.

It is undisputed that property is traditionally regulated by the State. The majority acknowledges that California has a legitimate interest in regulating museums and galleries, and that California Code of Civil Procedure § 354.3 "addresses the problem of Nazi-looted art currently hanging on the walls of the state's museums and galleries." Maj. Op. at 964-65. However, the majority goes on to hold that because Section 354.3 applies to any museum or gallery, "California has created a world-wide forum for the resolution of Holocaust restitution claims," and that the State is therefore acting outside the scope of its traditional interests. Maj. Op. at 965.

The majority reads the statute far too broadly. A reasonable reading of "any museum or gallery" would limit Section 354.3 to entities subject to the jurisdiction

of the State of California. Because California has a "serious claim to be addressing a traditional state responsibility," it is clear that *Garamendi* requires us to apply conflict preemption, not field preemption.

The majority's reliance on *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2005) is misplaced. The statute in *Deutsch*, California Code of Civil Procedure § 354.6, allowed recovery for slave labor performed "between 1929 and 1945, [for] the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." This court held that California impermissibly intruded upon the power of the federal government to resolve war by enacting the *Deutsch* statute "with the aim of rectifying wartime wrongs *committed by our enemies* . . . ." *Id.* at 708, 711(emphasis added).

The majority concludes that Section 354.3 suffers from a "fatal similarity" to the *Deutsch* statute because Section 354.3 applies to looted artwork. Maj. Op. at 966. I do not agree. The majority overlooks significant differences between the *Deutsch* statute and Section 354.3. First, as discussed above, here California has acted within the scope of its traditional competence to regulate property over which it has jurisdiction. Furthermore, unlike the statute in *Deutsch*, Section 354.3 does not target enemies of the United States for wartime actions. Nor, contrary to the majority's characterization, does

Section 354.3 provide for war reparations.[1] Maj. Op. at 966-67. Here, Appellee, a museum located in California, acquired stolen property in 1971. Appellant now seeks to recover that property. I fail to see how a California statute allowing such recovery intrudes on the federal government's power to make and resolve war.

I would reverse the district court. As the majority correctly holds, Section 354.3 does not conflict with federal policy. However, California has acted within its traditional competence, and field preemption should not apply. Accordingly, I dissent in part.

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1. Black's Law Dictionary defines reparation as "[c]ompensation for an injury or wrong, esp. for wartime damages or breach of an international obligation." *Black's Law Dictionary* 1325 (8th ed. 2004). Section 354.3 allows only for the recovery of stolen art.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 19, 2009

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 07-56691

MAREI VON SAHER,

Plaintiff-Appellant,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA; NORTON SIMON ART FOUNDATION,

Defendants-Appellees.

Argued and Submitted Dec. 8, 2008

Filed Aug. 19, 2009

Before: HARRY PREGERSON, D.W. NELSON and DAVID R. THOMPSON, Circuit Judges.

Opinion by Judge THOMPSON; Dissent by Judge PREGERSON.

Appendix B

OPINION

THOMPSON, Senior Circuit Judge:

Marei von Saher ("Saher") seeks the return of two paintings alleged to have been looted by the Nazis during World War II. The paintings were purchased in or around 1971 by the Norton Simon Museum of Art in Pasadena, California ("the Museum"), and are now on display there. Saher brought this claim against the Museum under § 354.3 of the California Code of Civil Procedure, which extends the statute of limitations until 2010 for actions for the recovery of Holocaust-era art. The primary issue on appeal is whether § 354.3 infringes on the national government's exclusive foreign affairs powers. The district court held that it does. We agree, and affirm the district court's holding that § 354.3 is preempted.

California also has a three-year statute of limitations for actions to recover stolen property. California Code of Civil Procedure § 338. The district court granted the Museum's Rule 12(b)(6) motion to dismiss Saher's complaint under that statute without leave to amend. Because it is possible Saher might be able to amend her complaint to bring her action within § 338, we reverse the district court's dismissal without leave to amend, and remand for further proceedings.

Appendix B

I. Background

A. Nazi Art Looting in WWII

During World War II, the Nazis stole hundreds of thousands of artworks from museums and private collections throughout Europe, in what has been termed the "greatest displacement of art in human history." Michael J. Bazyler, Holocaust Justice: The Battle for Restitution in America's Courts 202 (N.Y.U Press 2003).

Following the end of World War II, the Allied Forces embarked on the task of returning the looted art to its country of origin. In July 1945, President Truman authorized the return of "readily identifiable" works of art from U.S. collecting points. *See, e.g.*, Presidential Advisory Commission on Holocaust Assets in the United States, Plunder and Restitution: The U.S. and Holocaust Victims' Assets SR-142 (Dec. 2000) (hereinafter Plunder and Restitution). At the Potsdam Conference, President Truman formally adopted a policy of "external restitution," under which the looted art was returned to the countries of origin—not to the individual owners. American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, Report, 148 (1946) (hereinafter Roberts Commission Report).

Despite these restitution efforts, many paintings stolen by the Nazis were never returned to their rightful owners. *See, e.g.*, Bazyler at 204. Tracking the provenance of Nazi-looted art is nearly impossible, since

many changes of ownership went undocumented, and most of the transactions took place on the black market. *Id.* In recent years, a number of the world's most prominent museums have discovered their collections include art stolen during World War II. *Id.* at 205-06.

The federal government has continued to take action to address the recovery of Holocaust-era art. In 1998, Congress enacted the U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611 (codified as amended at 22 U.S.C. § 1621). This Act established the Presidential Advisory Commission on Holocaust Assets, which conducted research on the fate of Holocaust-era assets, and advised the President on future policies concerning the recovery of these assets. *Id.* That same year, the State Department convened a conference with forty-four other nations to address the recovery of Holocaust-era assets. U.S. Dep't of State, Proceedings of the Washington Conference on Nazi-Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/23231.htm (hereinafter Washington Conference Proceedings). In the meantime, numerous Holocaust victims and their heirs have turned to the courts to recover their looted art. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004).

B. Section 354.3

Many obstacles face those who attempt to recover Holocaust-era art through lawsuits. The challenges range from procedural hurdles such as statutes of

limitations, to prudential standing doctrines. *See, e.g.*, Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 Houston L. Rev. 193, 213-28 (2006); Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 Williamette J. Int'l L. & Disp. Resol. 243, 252-58 (2006). In 2002, California responded to these difficulties by enacting California Code of Civil Procedure § 354.3.[1] Section 354.3 provides:

> Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity described in paragraph (1) of subdivision (a). Subject to Section 410.10, that action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

Section 354.3(b). The California statute allows suits against "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance." Section 354.3(a)(1). The statute also extends the statute of limitations for § 354.3 claims until December 31, 2010. Section 354.3(c).

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1. All subsequent references are to the California Code of Civil Procedure, unless otherwise stated.

California has enacted several other laws extending the statute of limitations for claims relating to the Holocaust. *See, e.g.*, Section 354.5 (extending statute of limitations for insurance policy claims by Holocaust victims or their heirs); Section 354.6 (creating a cause of action and extending the statute of limitations for slave labor claims arising out of WWII). Both of these sister statutes have been found unconstitutional under the foreign affairs doctrine. *Steinberg v. Int'l Comm'n on Holocaust Era Ins. Claims*, 133 Cal. App. 4th 689, 34 Cal. Rptr. 3d 944, 953 (2005) (finding § 354.5 unconstitutional); *Deustch v. Turner*, 324 F.3d 692, 716 (9th Cir. 2003) (finding § 354.6 unconstitutional).

C. The Cranachs

Saher, the only surviving heir of Jacques Goudstikker, a deceased art dealer, filed this suit in 2007 against the Museum under § 354.3 and California Penal Code § 496, seeking the return of a diptych entitled "Adam and Eve." The diptych, a pair of oil paintings by sixteenth-century artist Lucas Cranach the Elder (hereinafter the "Cranachs"), is currently on public display at the Museum.

Goudstikker bought the Cranachs at an art auction in Berlin in or about May 1931.[2] Goudstikker was a

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2. The facts in this section are alleged in Saher's complaint; some are disputed by the Museum. Given the procedural posture of the case, we accept these factual allegations as true, and construe them in the light most favorable to Saher.

prominent art dealer in the Netherlands; he specialized in Old Master paintings. Goudstikker's collection contained more than 1,200 artworks, including Rembrandts, Steens, Ruisdaels, and van Goghs.

When the Nazis invaded the Netherlands in May 1940, Goudstikker and his family fled the country. The family left their assets behind, including the Gallery. Goudstikker brought with him a black notebook containing a list of over 1,000 of the artworks he had left behind in his collection (the "Blackbook"). The Blackbook lists the Cranachs as Numbers 2721 and 2722, and states that they were purchased at the Lepke Auction House and were previously owned by the Church of the Holy Trinity in Kiev.

After the Goudstikkers escaped, the Nazis looted Goudstikker's gallery. Herman Göring, Reischsmarschall of the Third Reich, seized the Cranachs and hundreds of other pieces from the gallery. Göring sent the artwork to Carinhall, his country estate near Berlin, where the collection remained until approximately May 1945 when the Allied Forces discovered it. The recovered artwork was then sent to the Munich Central Collection Point, where the works from the Goudstikker collection were identified. In or about 1946, the Allied Forces returned the Goudstikker artworks to the Netherlands.

The Cranachs were never restituted to the Goudstikker family. Instead, after restitution proceedings in the Netherlands, the Dutch government

delivered the two paintings to George Stroganoff, one of the claimants, and he sold them, through an art dealer, to the Museum.

The Museum filed a Rule 12(b)(6) motion to dismiss Saher's complaint filed in this case for the return of the paintings. The district court granted the motion and dismissed Saher's claim with prejudice. The district court held that § 354.3's extension of the statute of limitations was unconstitutional on its face, because it violated the foreign affairs doctrine, as interpreted and applied by the Ninth Circuit in *Deustch*, 324 F.3d 692. The district court concluded that by seeking to redress wrongs committed in the course of World War II, the California statute intruded on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims. The court then dismissed Saher's complaint because it had not been filed within the three-year period of California's statute of limitations, California Code of Civil Procedure § 338. This appeal followed.

II. Standard of Review

We review de novo the district court's decision dismissing Saher's complaint under Rule 12(b)(6). *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004). We accept all well-pleaded factual allegations as true, and construe them in the light most favorable to Saher. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007); *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1122 (9th Cir. 2008).

Appendix B

III. Motion for Judicial Notice

The Museum moves for judicial notice of two Presidential Commission reports, a military order approved by President Truman and enacted under the command of General Eisenhower, and a memorandum prepared by a State Department committee. Judicial notice of legislative facts such as these is unnecessary. Fed. R. Evid. 201(a), advisory comm. note to 1972 amendments. *See, e.g., Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002) ("[J]udicial notice is generally not the appropriate means to establish the legal principles governing the case.").

The Museum also moves for judicial notice of the fact that various newspapers, magazines, and books have published information about the Cranachs. Courts may take judicial notice of publications introduced to "indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." *Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006); *accord Heliotrope Gen. Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.118 (9th Cir. 1999) (taking judicial notice "that the market was aware of the information contained in news articles submitted by the defendants."). These publications meet the standards for admissibility set forth in Federal Rule of Evidence 201(b). Accordingly, we take judicial notice of them solely as an indication of what information was in the public realm at the time.

IV. Constitutionality of § 354.4 Under the Foreign Affairs Doctrine

The Supreme Court has characterized the power to deal with foreign affairs as a primarily, if not exclusively, federal power. *See, e.g., Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 413-14, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003); *Zschernig v. Miller*, 389 U.S. 429, 432, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S. Ct. 399, 85 L. Ed. 581 (1941). The Supreme Court has declared state laws unconstitutional under the foreign affairs doctrine when the state law conflicts with a federal action such as a treaty, federal statute, or express executive branch policy. *See, e.g., Garamendi*, 539 U.S. at 421-22, 123 S. Ct. 2374 (invalidating a California statute which conflicted with Presidential foreign policy); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-74, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (invalidating a Massachusetts statute which stood as an obstacle to a Congressional act imposing sanctions on Burma); *U.S. v. Belmont*, 301 U.S. 324, 327, 57 S. Ct. 758, 81 L. Ed. 1134 (1937) (holding that the Litvinov Assignment, an executive agreement, preempted New York public policy).

Occasionally, however, in the absence of any conflict, the Court has declared state laws to be incompatible with the federal government's foreign affairs power. *See, e.g., Zschernig*, 389 U.S. at 432, 88 S. Ct. 664 (striking down an Oregon probate law, in the absence of any federal action, because it was an "intrusion by the State into the field of foreign affairs which the

Constitution entrusts to the President and the Congress"); *Hines*, 312 U.S. at 63, 61 S. Ct. 399 (invalidating a Pennsylvania immigration law because the field of immigration regulation was occupied exclusively by federal statutes and regulations); *see also Deutsch*, 324 F.3d at 712 (concluding that § 354.6 infringed on the federal government's exclusive power to wage and resolve war).

The Museum argues that § 354.3 is preempted under either theory. First, the Museum contends, § 354.3 conflicts with the Executive Branch's policy of external restitution following World War II. Alternatively, the Museum argues, § 354.3 is preempted because it infringes on the federal government's exclusive power to conduct foreign affairs, and specifically, the power to redress injuries arising from war. We address each argument in turn.

A. Does § 354.3 Conflict With the Executive Branch's Policy of External Restitution?

Federal law's "power" to preempt state law arises from the Supremacy Clause, which provides that "the Laws of the United States" and "all Treaties . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. Under a traditional statutory preemption analysis, conflict or obstacle preemption occurs where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (citing *Hines*, 312

U.S. at 67, 61 S. Ct. 399) (internal quotation marks omitted).

Executive agreements settling claims with foreign nations and nationals have long been accorded the same preemptive effect. *Garamendi*, 539 U.S. at 416, 123 S. Ct. 2374 ("[V]alid executive agreements are fit to preempt state law, just as treaties are[.]"); *Dames & Moore v. Regan*, 453 U.S. 654, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981); *United States v. Pink*, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942); *Belmont*, 301 U.S. at 324. In *Garamendi*, the Supreme Court invalidated a California statutory scheme which facilitated litigation of Holocaust-era insurance claims. *Garamendi*, 539 U.S. at 401 123 S. Ct. 2374. The Court concluded that the California scheme posed an obstacle to the German Foundation Agreement and other expressions of Executive Branch policy preferring non-judicial resolution of such claims. *Id.* at 405-07, 123 S. Ct. 2374.

Here, the Museum contends that § 354.3 is preempted by the Executive Branch's policy of external restitution. This policy, the Museum argues, was expressed in two main sources: first, the London Declaration, and second, "Art Objects in U.S. Zone," a U.S. policy statement approved by President Truman during the Potsdam Conference in August of 1945.

London Declaration

The United States and the Netherlands, along with sixteen other nations, were signatories to the London Declaration of January 5, 1943. Forced Transfers of

Appendix B

Property in Enemy-Controlled Territory, 1943, in 3 Dep't of State, Treaties and Other International Agreements of the United States of America 1776-1949, p. 754 (C. Bevans comp. 1969) (hereinafter Bevans). The Declaration served as a "formal warning to all concerned, and in particular persons in neutral countries," that the Allies intended "to do their utmost to defeat the methods of dispossession practiced by the governments with which they [were] at war[.]" *Id.*

In the Declaration, the Allies explicitly reserved the right to invalidate wartime transfers of property, regardless of "whether such transfers or dealings [had] taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport[ed] to be voluntarily effected." *Id.* The Declaration does not explicitly address restitution or reparations, but has been credited by some with laying the foundation for the United States's postwar restitution policy. *See, e.g.*, Plunder and Restitution at SR-139.

Art Objects in U.S. Zones

When the American forces entered Germany in the winter of 1944-45, they discovered large stashes of Nazi-looted art, hidden in castles, banks, salt mines, and even caves. Plunder and Restitution at SR-13, SR-85. U.S. authorities established several central collection points within the U.S. Zone to assemble the recovered artwork "for proper care and study." Report, Art Objects in U.S. Zone, July 29, 1945, NACP, RG 338, USGCC HQ, ROUS

Army Command, Box 37, File: Fine Art [313574-575] (hereinafter "Art Objects in U.S. Zone").

On July 29, 1945, at the Potsdam Conference, President Truman approved a policy statement setting forth the standard operating procedures governing the looted artwork found within the U.S. zone of occupation. Art Objects in U.S. Zone; Roberts Commission Report at 148. The governments of the formerly occupied countries submitted consolidated lists of items taken by the Germans, with information about the location and circumstances of the theft. Plunder and Restitution at SR-142. The U.S. authorities examined the lists, and when artwork was identified, it was returned to the country of origin. *Id.* Under this policy of "external restitution," the U.S. restituted the looted artwork to countries, not individuals. Art Objects in U.S. Zone; Plunder and Restitution at SR-139-SR 142. The newly liberated governments were responsible for restituting the art to the individual owners. Once the art was returned to the country of origin, the U.S. played no further role.

A contemporaneous memorandum from the State Department illuminates several of the reasons the federal government preferred the policy of external restitution over individual restitution. U.S. Dep't of State, Memorandum from Interdivisional Comm. on Rep., Rest., & Prop. Rights, Subcomm. 6, Recommendations on Restitution, Apr. 10, 1944, 1, NACP, RG 59, Lot 62D-4, Box 49, State/Notter, [320633644] (hereinafter Recommendations on

Restitution). First, in view of the complexities of the sham transactions through which the Nazis seized many of the artworks, the State Department felt it best to allow the individual countries to handle restitution in "whatever way they see fit." *Id.* at 2. Second, the State Department observed, in some cases, it might "be impossible to locate the original owners or their heirs and the governments involved will have to decide what should be done with the property or proceeds therefrom." *Id.* Finally, the State Department recognized that the liberated countries themselves had a stake in the restitution of art owned by their citizens:

> [I]n many, if not most, cases the local funds [with which the Nazis "purchased" the art from the persecuted] were supplied originally by the local government or central bank as occupation costs or through forced credits. The Germans in effect forced the local government to pay for their purchases. The individual owner received recompense in local currency but the country as a whole received no recompense for the transfer of property to foreign owners. These cases constitute looting just as much as the cases of outright seizure without recompense.

Id. at 2-3.

The U.S. authorities stopped accepting claims for external restitution of looted artwork as of September 15, 1948. Plunder and Restitution at SR-143. By the

beginning of 1949, close to three million pieces of Jewish cultural property had been restituted to twelve different countries by the U.S. authorities. *Id.*

Had California enacted § 354.3 in 1945, it would have directly conflicted with the federal government's policy of external restitution. If the statute had been enacted in the immediate aftermath of the war, it would have presented a competing method of resolving restitution claims, and a forum for individuals to seek the return of their looted art—in clear contravention of the Executive Branch policy. The California statute also would have presented a direct threat to several of the goals underlying the Executive Branch's policy, including the rehabilitation of Germany.

The United States's policy of external restitution, however, ended in 1948. After September 15, 1948, the U.S. authorities refused to accept any more claims for external restitution. Plunder and Restitution at SR-143. In fact, as Saher states in her complaint, the Cranachs were returned to the Netherlands through the U.S. external restitution program. Section 354.3 cannot conflict with or stand as an obstacle to a policy that is no longer in effect.

The Museum also argues, however, that many of the federal government's concerns leading to the external restitution policy remain relevant today. For example, the Museum argues that claims under § 354.3 are problematic, because they ask California courts to

review the restitution decisions of foreign governments.[3] Even if true, there would still be no conflict because, as stated above, the external restitution policy is no longer in effect.

In sum, had the California statute been enacted immediately following WWII, it undoubtedly would have conflicted with the Executive Branch's policy of external resolution. The statute does not, however, conflict with any current foreign policy espoused by the Executive Branch.

B. In the Absence of Any Conflict With Federal Law or Foreign Policy, is § 354.3 Nonetheless Preempted Under the Foreign Affairs Doctrine?

At times, albeit seldomly, the Supreme Court has found a state law to be preempted because it infringes upon the federal government's exclusive power to conduct foreign affairs, even though the law does not conflict with a federal law or policy. *Zschernig*, 389 U.S. at 432, 88 S. Ct. 664; *Hines*, 312 U.S. at 63, 61 S. Ct. 399. In *Garamendi*, the Court suggested that a traditional statutory "field" preemption analysis should be employed in such cases:

> If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state

3. These and other related concerns are addressed more fully in the section below dealing with field preemption.

> responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted, and if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S. Ct. 399, 85 L. Ed. 581 (1941).

Garamendi, 539 U.S. at 420 n.11, 123 S. Ct. 2374.

Unlike its traditional statutory counterpart, foreign affairs field preemption may occur "even in [the] absence of a treaty or federal statute, [because] a state may violate the Constitution by establishing its own foreign policy." *Deutsch*, 324 F.3d at 709 (internal citation and quotations omitted). The central question, then, is this: in enacting § 354.3, has California addressed a traditional state responsibility, or has it infringed on a foreign affairs power reserved by the Constitution exclusively to the national government?

1. Does § 354.3 Concern a Traditional State Responsibility?

Saher contends § 354.3 concerns a quintessential state function: the establishment of a statute of limitations for actions seeking the return of stolen property. Property, of course, is traditionally regulated by the state. But § 354.3 cannot be fairly categorized as a garden variety property regulation. Section 354.3 does

not apply to all claims of stolen art, or even all claims of art looted in war. The statute addresses only the claims of Holocaust victims and their heirs. Section 354.3(b).

Courts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs. *See, e.g., Garamendi*, 539 U.S. at 425-26, 123 S. Ct. 2374 (rejecting purported state interest in regulating insurance business and blue sky laws); *Crosby*, 530 U.S. at 367, 373 n.7, 120 S. Ct. 2288 (rejecting purported state interest in taxing and spending); *Zschernig v. Miller*, 389 U.S. 429, 437-38, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968) (rejecting purported state interest in regulating descent of property); *Deutsch*, 324 F.3d at 707 (rejecting purported state interest in procedural rules).

The *Garamendi* Court in dicta rejected the "traditional state interests" advanced by California in support of HVIRA, finding instead that the real purpose of the state law was the "concern for the several thousand Holocaust survivors said to be living in the state." *Garamendi*, 539 U.S. at 426, 123 S. Ct. 2374. Though § 354.3 purports to regulate property, an area traditionally left to the states, like HVIRA, § 354.3's real purpose is to provide relief to Holocaust victims and their heirs.

California's desire to help its resident Holocaust victims and their heirs is a noble legislative goal, with which we are entirely sympathetic. In *Garamendi*, however, the Supreme Court held that "California's concern for the several thousand Holocaust survivors

said to be living in the state . . . does not displace general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction, under which the State's claim is not a strong one." *Garamendi*, 539 U.S. at 426-27, 123 S. Ct. 2374. The State's interest alone was not sufficient in *Garamendi* to save the statute: "[T]here being about 100,000 survivors in the country, only a small fraction of them live in California. As against the responsibility of the United States of America, the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy." *Id.*

California arguably has a stronger interest in enacting § 354.3 than it did in enacting the related statutes struck down in *Deutsch* and *Garamendi*. Section 354.3 addresses the problem of Nazi-looted art currently hanging on the walls of the state's museums and galleries. Assem. Jud. Com., Background Information Worksheet for Assem. Bill No. 1758 (2001-2002 Reg. Sess.) Jan. 30, 2002.

California certainly has a legitimate interest in regulating the museums and galleries operating within its borders, and preventing them from trading in and displaying Nazi-looted art. Indeed, it appears the original goal of § 354.3 may have been to regulate California museums and galleries in such a manner. Prior to its enactment, however, the bill was amended. The restriction limiting the scope of the statute to suits against "museums and galleries in California" was stricken. Assem. Amend. to Assem. Bill No. 1758 (2001-

2002 Reg. Sess.); Sen. Jud. Com., Analysis of Assem. Bill No. 1758 (2001-2002 Reg. Sess.) Jun. 25, 2002, pp. 5-6. As enacted, the statute allows suits against "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance," whether located in the state or not. Section 354.3(a)(1).

The scope of the statute as enacted belies California's purported interest in protecting its residents and regulating its art trade. The amended version of § 354.3 suggests that California's real purpose was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the state. A memorandum from the Governor's office provides further illustration of California's intent. In it, California is characterized as a pioneering leader in the quest for justice for Holocaust victims:

> In the past decade, it has come to the public's attention that spoils gained by the Nazi Holocaust were enjoyed not just by the Nazis. *California has been a leader in exposing those entities* who benefitted financially from the plunder or exploited the unusual circumstances of the Holocaust, who have been less than forthcoming in their business dealings.

Governor's Office of Planning & Research, Enrolled Bill Report on Assem. Bill No. 1758 (2001-2002) Reg. Sess.) Aug. 1, 2002 (emphasis added).

By opening its doors as a forum to all Holocaust victims and their heirs to bring Holocaust claims in California against "any museum or gallery" whether located in the state or not, California has expressed its dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of Word War II. In so doing, California can make "no serious claim to be addressing a traditional state responsibility." *Garamendi*, 539 U.S. at 419 n.11, 123 S. Ct. 2374; *see also Deutsch*, 324 F.3d at 712 (rejecting California's interest in "redress[ing] wrongs committed in the course of the Second World War"). California cannot have a "distinct juristic personality" from that of the United States when it comes to matters of foreign affairs. *Pink*, 315 U.S. at 232, 62 S. Ct. 552. When it comes to dealings with foreign nations, "state lines disappear." *Belmont*, 301 U.S. at 331, 57 S. Ct. 758.

In sum, the scope of § 354.3 belies any purported state interest in regulating stolen property or museums or galleries within the State. By enacting § 354.3, California has created a world-wide forum for the resolution of Holocaust restitution claims. While this may be a laudable goal, it is not an area of "traditional state responsibility," and the statute is therefore subject to a field preemption analysis. *See Garamendi*, 539 U.S. at 419 n.11, 123 S. Ct. 2374.

2. Does the California Statute Intrude on a Power Expressly or Impliedly Reserved to the Federal Government by the Constitution?

The District Court held that § 354.3 intrudes on the power to make and resolve war, a power reserved exclusively to the federal government by the Constitution. We agree.

The Constitution divides the war power between the Executive, who is the Commander-in-Chief of the Armed Forces, and the Congress, who has the power to declare war. U.S. Const. art. II, § 2; *Id.* at art. I, § 8. *Deutsch* clearly provides that "[m]atters related to war are for the federal government alone to address," and state statutes which infringe on this power will be preempted. *Deutsch*, 324 F.3d at 712.

Section 354.3 establishes a remedy for wartime injuries. The legislative findings accompanying the statute repeatedly reference the "Nazi regime," "Nazi persecution," and "the many atrocities" the Nazis committed. 2002 Cal. Legis. Serv. 332 (West 2002). By enacting § 354.3, California "seeks to redress wrongs committed in the course of the Second World War" — a motive that was fatal to § 354.6. *Deutsch*, 324 F.3d at 712.

Section 354.3 was closely modeled on § 354.6, which was found to infringe on the federal government's exclusive power to make and resolve war. Sen. Rules

Com., Off. of Sen. Floor Analyses, 3d. reading analysis of Assem. Bill No. 1758 (2001-2002 Reg. Sess.) Aug. 8, 2002. Like its sister statute struck down in *Deutsch*, § 354.3 "creates a special rule that applies only to a newly defined class" of plaintiffs. *Id.* Like § 354.6, § 354.3 creates a new cause of action "with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection." 324 F.3d at 708. This is significant because, as the *Deutsch* Court noted, "[a] state is generally more likely to exceed the limits of its power when it seeks to alter or create rights and obligations than when it seeks merely to further enforcement of already existing rights and duties." 324 F.3d at 708.

Saher, however, argues that § 354.3 is distinguishable from the statute at issue in *Deutsch*, because it does not target former wartime enemies. Section 354.3 authorizes suits only against museums and galleries, but the actionable injury at the heart of the statute is the Nazi theft of art. The California legislature enacted § 354.6 "with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection." *Deutsch*, 324 F.3d at 708. California enacted § 354.3 with the same verboten intent. Distinctions between the class of eligible defendants are irrelevant in light of this fatal similarity.

Saher also contends that under *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), claims for restitution of "garden variety property" can be distinguished from

claims for reparation arising from wartime injury. In *Alperin* we considered whether the claims for restitution presented by a class of Holocaust survivors presented a nonjusticiable political question. Saher places particular reliance on the following quote: "Reparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution." *Alperin*, 410 F.3d at 551. This quote references the first *Baker* test, which requires courts to consider whether the case in question concerns an issue that has been textually committed by the Constitution to another branch of government. *Id.* at 544, 549-52 (citing *Baker v. Carr*, 369 U.S. 186, 210-11, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)). Ultimately, in *Alperin* we concluded that despite the political overtones inherent in cases brought by Holocaust survivors, the underlying property issues presented in such cases were not political questions constitutionally committed to the political branches. *Id.* at 551.

Saher's reliance on *Alperin* is misplaced. Our holding that the judiciary has the power to adjudicate Holocaust-era property claims does not mean that states have the power to provide legislative remedies for these claims. Here, the relevant question is whether the power to wage and resolve war, including the power to legislate restitution and reparation claims, is one that has been exclusively reserved to the national government by the Constitution. We conclude that it has.

Section 354.3, at its core, concerns restitution for injuries inflicted by the Nazi regime during Word

War II. Claims brought under this statute, including the instant claim, would require California courts to review acts of restitution made by foreign governments. For example, in this case, the parties contest the provenance of the Cranachs. In order to determine whether the Museum has good title to the Cranachs, a California court would necessarily have to review the restitution decisions made by the Dutch government and courts. This example illustrates that § 354.3 claims cannot be separated from the Nazi transgressions from which they arise.

Our conclusion today is buttressed by the documented history of federal action addressing the subject of Nazi-looted art. The Art Looting and Investigation Unit of the Office of Strategic Services gathered a great deal of intelligence about looted art through covert operations during and after the war. Plunder and Restitution at SR-92. Immediately following the war, the federal government implemented the program of external restitution, as discussed in more detail above. It is beyond dispute that there was no role for individual states to play in the restitution of Nazi-looted assets during and immediately following the war.

Recent Administrations and Congresses continue to address problems facing Holocaust survivors and their heirs. *See, e.g.*, Pub. L. No. 105-186, June 23, 1998, 112 Stat. 611, codified at 22 U.S.C. § 1621 (establishing the Presidential Advisory Commission on Holocaust Assets in the United States); Plunder & Restitution, supra (the final report of the Presidential Advisory Commission on

Holocaust Assets in the United States); U.S. Dep't of State, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/23231.htm (hereinafter Washington Principles). (adopted by the forty-four governments participating in the Washington Conference on Holocaust-Era Assets, hosted by the State Department on December 3, 1998). This history of federal action is so comprehensive and pervasive as to leave no room for state legislation. *Cf. English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990) (discussing traditional statutory field preemption).

Finally, the federal government, "representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines*, 312 U.S. at 63, 61 S. Ct. 399. The recovery of Holocaust-era art affects the international art market, as well as foreign affairs. Many have called for the creation of an international registration system, and a commission to settle Nazi-looted art disputes. *See, e.g., Pollock*, 43 Houston L. Rev. at 231. Only the federal government possesses the power to negotiate and establish these or other remedies with the international community. As discussed above, the federal government has initiated discussions with other countries, which will hopefully yield a comprehensive remedy for all Holocaust victims and their heirs. *See, e.g.*, Washington Conference Report. No organization comparable to the International Commission on Holocaust Era Insurance Claims has been established yet to resolve Holocaust-era art claims. This does not, however, justify

California's intrusion into a field occupied exclusively by the federal government.

In sum, it is California's *lack* of power to act which is ultimately fatal. In *Deutsch*, we held that "[i]n the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes." *Deutsch*, 324 F.3d at 714. California may not improve upon or add to the resolution of the war. *Id.* The factual circumstances surrounding this case — the many years which have passed since Göring stole the Cranachs from Goudstikker, restitution of the paintings to the Netherlands by the Allies, or the changes in ownership since then — cannot save § 354.3 from this fatal flaw.

V. Did the District Court Err in Concluding that Saher's claim was Time-Barred Under California Code of Civil Procedure § 338?

Though Saher cannot bring her claim under § 354.3, she may be able to state a cause of action within the three-year statute of limitations of § 338. The district court held that Saher's § 338 claim was time-barred, because she did not inherit her interest in the Cranachs until after the statute of limitations on the claim had expired. The claim, however, might survive a Rule 12(b)(6) motion to dismiss depending upon how Saher might be able to allege the notice element.

Appendix B

A. Constructive Notice

At the time the museum acquired the Cranachs, around 1971, § 338 provided a strict three-year statute of limitations. Cal. Civ. Proc. Code § 338(3).[4] In 1982, the section was amended to incorporate a discovery rule: "[T]he cause of action in the case of theft, as defined in § 484 of the Penal Code, of any art or artifact is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft."[5] Cal. Civ. Proc. Code § 338(c); 1982 Cal. Legis. Serv. 3401 (West). Saher does not claim that the 1982 amendments should be applied to her case. Rather, she contends that the statute of limitations on her claim did not begin to run until she discovered that the Cranachs were in the possession of the museum.

Decisions from California's intermediate appellate court have reached differing conclusions as to when the statute of limitations under § 338 begins to run for property stolen prior to 1983. In *Naftzger v. American Numismatic Society*, the court held that a cause of action for the return of property stolen before the 1982

4. In 1988, § 383(3) was renumbered § 383(c); all subsequent references refer to subsection (c) for simplicity's sake. 1988 Cal. Legis. Serv. 1186 (West).

5. In 1989, the phrase "art or artifact" was replaced with "article of historical, interpretive, scientific, or artistic significance." Cal. Civ. Proc. Code § 338(c) (West 1989).

amendment "accrue[s] when the owner discovered the identity of the person in possession of the stolen property, and not when the theft occurred." 42 Cal. App. 4th 421, 49 Cal. Rptr. 2d 784, 786 (1996). The *Naftzger* court concluded that "there was a discovery rule of accrual implicit in the prior version of section 338." 49 Cal. Rptr. 2d at 786. In *Society of California Pioneers v. Baker*, however, the court held that prior to the 1982 amendments, "the statute of limitations began to run anew against a subsequent purchaser." 43 Cal. App. 4th 774, 50 Cal. Rptr. 2d 865, 869-70 (1996). The *Pioneers* court specifically noted its disagreement with *Naftzger*. 50 Cal. Rptr. 2d at 870 n.10.

The California Supreme Court has not addressed the issue, but "has, however, specifically held that the discovery rule, whenever it applies, incorporates the principle of constructive notice." *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007) (citing *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1109, 245 Cal. Rptr. 658, 751 P.2d 923 (1988)). Thus, in *Orkin*, we concluded that "under the discovery rule, a [pre-1983] cause of action accrues when the plaintiff discovered *or reasonably could have discovered* her claim to and the whereabouts of her property." *Id.* at 471.

Saher argues, however, that the *Naftzger* court adopted a discovery rule based on actual, not constructive, notice. As we pointed out in *Orkin*, such a rule would be clearly inconsistent with California Supreme Court precedent. *Id.* (citing *Jolly*, 44 Cal. 3d at 1109, 245 Cal. Rptr. 658, 751 P.2d 923).

Saher urges that we certify the issue to the Supreme Court of California for resolution. Though Saher contends that the Orkin court's interpretation of California state law is incorrect, "it is well established that we may reconsider earlier Ninth Circuit precedent only by en banc review or after an intervening Supreme Court decision." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1285 (9th Cir. 1992) (declining to revisit the court's interpretation of New York state law under similar circumstances). Under *Orkin*, we are bound to apply a constructive notice standard.

In conclusion, Saher's cause of action began to accrue when she discovered or reasonably could have discovered her claim to the Cranachs, and their whereabouts. *Orkin*, 487 F.3d at 741.

B. Reasonable Diligence

The Museum asserts that Saher is precluded as a matter of law from making the required showing of reasonable diligence, because the facts underlying her claim were publicly available. We disagree.

A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by the applicable statute of limitations only when "the running of the statute is apparent on the face of the complaint." *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006). "[A] complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim."

Supermail Cargo, Inc. v. U.S., 68 F.3d 1204, 1206 (9th Cir. 1995).

In *Orkin*, we concluded that the plaintiffs' claims were time-barred because the face of the complaint established facts that foreclosed any showing of reasonable diligence. *Orkin*, 487 F.3d at 742. The Orkins' complaint admitted that the defendant had purchased the painting in question at a publicized auction, and that she was listed as the owner in a publicly available catalogue raisonné. *Id.* at 741-42. By contrast, there are no facts on the face of Saher's complaint which foreclose a showing of lack of reasonable notice as a matter of law.

The Museum contends that the articles submitted for judicial notice conclusively establish that Saher is foreclosed from demonstrating reasonable diligence. Yet the Museum fails to point to any authority which holds that a motion to dismiss based on a statute of limitations may be granted on the basis of facts judicially noticed, rather than facts apparent on the face of the complaint.

From the face of Saher's complaint, it is not clear that the statute of limitations has expired. Unless it is clear that the complaint could not be saved by amendment, dismissal with prejudice and without leave to amend is not appropriate. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

Accordingly, Saher's complaint should not have been dismissed without leave to amend.

VI. Conclusion

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part. The case is **REMANDED** for further proceedings consistent with this opinion.

Appendix B

PREGERSON, Circuit Judge, dissenting in part:

I dissent from the majority's conclusion that California is acting outside the realm of traditional state responsibility, and that field preemption applies. Where a State acts within its "traditional competence," the Supreme Court has suggested that conflict preemption, not field preemption, is the appropriate doctrine. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003). *Garamendi* counsels that field preemption would apply "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility. . . ." *Id.* That is not the case here.

It is undisputed that property is traditionally regulated by the State. The majority acknowledges that California has a legitimate interest in regulating museums and galleries, and that California Code of Civil Procedure § 354.3 "addresses the problem of Nazi-looted art currently hanging on the walls of the state's museums and galleries." Maj. Op. at 1026. However, the majority goes on to hold that because Section 354.3 applies to any museum or gallery, "California has created a world-wide forum for the resolution of Holocaust restitution claims," and that the State is therefore acting outside the scope of its traditional interests. Maj. Op. at 1027.

The majority reads the statute far too broadly. A reasonable reading of "any museum or gallery" would

limit Section 354.3 to entities subject to the jurisdiction of the State of California. Because California has a "serious claim to be addressing a traditional state responsibility," it is clear that *Garamendi* requires us to apply conflict preemption, not field preemption.

The majority's reliance on *Deutsch v. Turner*, 324 F.3d 692 (9th Cir. 2003) is misplaced. The statute in *Deutsch*, California Code of Civil Procedure § 354.6, allowed recovery for slave labor performed "between 1929 and 1945, [for] the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." This court held that California impermissibly intruded upon the power of the federal government to resolve war by enacting the *Deutsch* statute "with the aim of rectifying wartime wrongs *committed by our enemies. . . .*" *Id.* at 708, 711(emphasis added).

The majority concludes that Section 354.3 suffers from a "fatal similarity" to the *Deutsch* statute because Section 354.3 applies to looted artwork. Maj. Op. at 1027. I do not agree. The majority overlooks significant differences between the *Deutsch* statute and Section 354.3. First, as discussed above, here California has acted within the scope of its traditional competence to regulate property over which it has jurisdiction. Furthermore, unlike the statute in *Deutsch*, Section 354.3 does not target enemies of the United States for wartime actions. Nor, contrary to the majority's characterization, does

Section 354.3 provide for war reparations.[1] Maj. Op. at 1028. Here, Appellee, a museum located in California, acquired stolen property in 1971. Appellant now seeks to recover that property. I fail to see how a California statute allowing such recovery intrudes on the federal government's power to make and resolve war.

I would reverse the district court. As the majority correctly holds, Section 354.3 does not conflict with federal policy. However, California has acted within its traditional competence, and field preemption should not apply. Accordingly, I dissent in part.

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1. Black's Law Dictionary defines reparation as "[c]ompensation for an injury or wrong, esp. for wartime damages or breach of an international obligation." *Black's Law Dictionary* 1325 (8th ed. 2004). Section 354.3 allows only for the recovery of stolen art.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED OCTOBER 18, 2007

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-2866-JFW (JTLx)

MAREI VON SAHER

v.

NORTON SIMON MUSEUM OF ART AT PASADENA, et al.

Oct. 18, 2007

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED
[filed 7/9/07; Docket No. 20]

ORDER VACATING SCHEDULING CONFERENCE

JOHN F. WALTER, District Judge.

On July 9, 2007, Defendants Norton Simon Museum of Art at Pasadena, Norton Simon Art Foundation, and Norton Simon Foundation (collectively "Defendants") filed a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted. On August 20, 2007, Plaintiff Marei

von Saher ("Plaintiff") filed her Opposition. On August 20, 2007, the Court granted the Application of Bet Tzedek Legal Services, the Jewish Federation Council of Greater Los Angeles, and the American Jewish Congress for Leave to File Memorandum as Amici Curiae. On September 17, 2007, Defendants filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for October 22, 2007 is hereby vacated and the matter taken off calendar. After considering the moving, opposing, and reply papers and the arguments therein, the Court rules as follows:

Adam and *Eve,* two sixteenth century oil paintings on wood panels by Lucas Cranach the Elder, (the "Cranachs") are currently on display at Defendant Norton Simon Museum of Art at Pasadena. The Cranachs were acquired by Defendants Norton Simon Foundation and Norton Simon Art Foundation from George Stroganoff-Scherbatoff in 1971 and have been continuously on display at the Museum since 1979.

On May 1, 2007, Plaintiff filed a Complaint against Defendants in which she alleges that "[t]he Cranachs were looted by the Nazis from a noted Jewish [art] collector and dealer[, Jacques Goudstikker,] during their ¶ 1. Plaintiff claims that as the "sole living heir" of Mr. Goudstikker, she is "the rightful owner, and is thus entitled to recover sole possession, of the Cranachs."

Id. at ¶¶ 2, 41, 46. Plaintiff brings this action under California Code of Civil Procedure § 354.3 and alleges the following claims for relief: (1) Replevin; (2) Conversion; (3) Damages under California Penal Code § 496; (4) Quiet title; and (5) Declaratory relief.

Defendants move to dismiss each of Plaintiff's claims on the grounds that: (1) they are barred by California's three years statute of limitations in California Code of Civil Procedure § 338 and cannot be revived by Section 354.3 because Section 354.3 is unconstitutional on its face and as applied; (2) Plaintiff cannot establish "plausible grounds" for challenging Defendant Norton Simon Art Foundation's ownership of the Cranachs; and (3) Plaintiff has not and cannot plead sufficient facts to establish a violation of California Penal Code § 496.

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Accordingly, "[a] Rule 12(b)(6) dismissal is proper only where there is either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Summit Technology, Inc. v. High-Line Medical Instruments Co., Inc.*, 922 F. Supp. 299, 304 (C.D. Cal. 1996) (*quoting Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)). In deciding a motion to dismiss, a court must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to the nonmoving party. *See, e.g., Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th Cir.

1998). "However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Technology*, 922 F. Supp. at 304 (*citing Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) *cert. denied*, 454 U.S. 1031, 102 S. Ct. 567, 70 L. Ed. 2d 474 (1981)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations omitted). However, a court may consider material which is properly submitted as part of the complaint and matters which may be judicially noticed pursuant to FRE 201 without converting the motion to dismiss into a motion for summary judgment. *See id.; Branch v. Tunnel*, 14 F.3d 449, 454 (9th Cir. 1994). Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *See Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996).

In their motion, Defendants argue that Section 354.3 is unconstitutional on its face on the grounds that it "has the purpose and effect of inserting California into the business of remedying war injuries, a matter of exclusive federal competence." Motion at 12. Section 354.3, which became effective on January 1, 2003, provides:

> (a) The following definitions govern the construction of this section:

(1) "Entity" means any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.

(2) "Holocaust-era artwork" means any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive.

(b) Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity described in paragraph (1) of subdivision (a). Subject to Section 410.10, that action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution. Section 361 does not apply to this section.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

Cal. Code Civ. P. § 354.3.

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Shortly after Section 354.3 became effective, the Ninth Circuit addressed the constitutionality of a substantially similar or "sister" statute, Section 354.6, in *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003). Section 354.6 was "[a] California statute passed in 1999 [which] create[d] a cause of action . . . for claims involving Second World War slave labor." *Deutsch*, 324 F.3d at 703. Like Section 354.3, under Section 354.6, certain claims were not time-barred if an action was commenced on or before December 31, 2010. *See* Cal. Code Civ. P. § 354.6. In *Deutsch*, the Ninth Circuit found Section 354.6 unconstitutional on its face on the grounds that it violated the foreign affairs doctrine. Specifically, the Ninth Circuit explained that "the Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design. In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes" *Deutsch*, 324 F.3d at 714-15. The Ninth Circuit found that by enacting Section 354.6, "California has sought to create its own resolution to a major issue arising out of the war — a remedy for wartime acts that California's legislature believed had never fairly been resolved." *Id.* at 712. As a result, the Ninth Circuit held that "Section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states. Because California lacks the power to create a right of action —

or, alternatively, to resurrect time-barred claims — in order to provide its own remedy for war-related injuries inflicted by our former enemies and those who operated in their territories, we hold that section 354.6 is unconstitutional." *Id.* at 716.

As with Section 354.6, by enacting Section 354.3, "California seeks to redress wrongs committed in the course of the Second World War" — a legislative act which "intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." *Id.* at 712. There can be no doubt that, as Judge Reinhardt stated in *Deutsch*, the Holocaust was "the most atrocious act ever perpetrated by a civilized (or uncivilized) people" and "represents the worst historic manifestation of the perpetual human condition known as antisemitism." There are no words which can adequately describe the atrocities suffered by the victims of the Holocaust, and the harms suffered continue to have an effect on the victims and their descendants. For that reason, the Court shares the Ninth Circuit's reluctance in finding unconstitutional a statute which attempts to provide at least some measure of redress to those victims and their families. However, the Court is not only compelled to apply the foreign affairs doctrine, it is bound by the interpretation of that doctrine as set forth by the Ninth Circuit in *Deutsch*. *See, e.g., Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001). Accordingly, in light of and based upon the

Ninth Circuit's decision in *Deutsch*, the Court finds Section 354.3 facially, unconstitutional.[1]

In her Complaint, Plaintiff admits that "one or more of the Defendants acquired the Cranachs" in 1971 and claims that "Defendants have wrongfully continued to retain possession of the Cranachs since that time." Complaint at ¶ 32. Under the version of California Code of Civil Procedure § 338 in effect at the time Defendants acquired the Cranachs, Plaintiff's predecessor-in-interest had three years to bring "[a]n action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property." *See* Cal. Code Civ. P. § 338. According to her Complaint, Plaintiff did not inherit her alleged claim to the Cranachs until July 21, 1996 — long after the applicable statute of limitations on that claim would have expired. *See* Complaint at ¶ 35. As a result, in the absence of Section 354.3, it is apparent from the allegations of Plaintiff's Complaint that each of Plaintiff's underlying claims for relief is time-barred.[2] *See* Cal. Code Civ. P. § 338.

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1. In light of the Court's finding that dismissal of Plaintiff's Complaint is appropriate because the statute under which Plaintiff's action is brought is unconstitutional, the Court need not address Defendants' remaining arguments in support of their Motion to Dismiss.

2. Plaintiff alleges that she did not "discover" that the Cranachs were in Defendants' possession until November of 2000. *See* Complaint at ¶ 36. However, her alleged "discovery" of the whereabouts of the Cranachs would not revive the statute of limitation governing her claims which had expired many years prior.

For all of the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED.** Plaintiff's Complaint is **DISMISSED with prejudice.**

The Scheduling Conference, currently on calendar for October 22, 2007, is **VACATED.**

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.

APPENDIX D — RELEVANT CONSTITUTIONAL PROVISIONS

Article. I.

* * *

Section. 8.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

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To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

Appendix D

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * *

Appendix D

Section. 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

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Article. II.

* * *

Section. 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Appendix D

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

* * * *

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

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Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX E — RELEVANT STATUTE

California Code of Civil Procedure

§ 354.3. Recovery of Holocaust-era artwork from enumerated entities

(a) The following definitions govern the construction of this section:

(1) "Entity" means any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.

(2) "Holocaust-era artwork" means any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive.

(b) Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity described in paragraph (1) of subdivision (a). Subject to Section 410.10, that action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution. Section 361 does not apply to this section.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

Supreme Court, U.S.
JUN 16 2010
OFFICE OF THE CLERK

No. 09-1254

IN THE

Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA AND NORTON SIMON ART FOUNDATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Norton Simon Art Foundation, a California nonprofit public benefit corporation, has no parent corporation. No other person or publicly held corporation owns 10% or more of the stock of the Norton Simon Art Foundation.

Respondent Norton Simon Museum of Art at Pasadena, a California nonprofit public benefit corporation, has no parent corporation. No other person or publicly held corporation owns 10% or more of the stock of the Norton Simon Museum of Art at Pasadena.

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INTRODUCTION

By enacting California Code of Civil Procedure § 354.3 ("Section 354.3" or "§ 354.3"), the State of California has attempted to provide its own resolution of claims for artwork looted by the Nazis. That provision is part of a programmatic effort by the State to resolve claims arising out of foreign wars, including other World War II-related injuries. The federal and state courts have spoken with one voice in considering challenges to these statutes: each has been struck down on the ground that it impermissibly usurped the federal government's foreign affairs power. The Ninth Circuit's Opinion falls in line with these authorities, holding that "Section 354.3 intrudes on the power to make and resolve war, a power reserved exclusively to the federal government." Pet. App. 25a.

Confronted with this uniform precedent, Petitioner does not even contend that certiorari is warranted to resolve a conflict in the lower courts. Instead, Petitioner's lead argument is that the Ninth Circuit erred in its application of *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), because it "misconstru[ed]" the "legislative history" of the California statute. Pet. 11. Yet, this Court's rules make plain that certiorari is not available to review errors in the application of this Court's precedent, let alone errors in the proper interpretation of state law. Sup. Ct. R. 10. Nor does the Petition present an issue of exceptional importance. The parties have identified only one other pending case involving Section 354.3; the statute is set to expire at the end of *this year*; and Petitioner has failed to identify any similar state laws outside California, a point underscored by the absence of amicus briefs by other states supporting the Petition.

Petitioner and her amici insist that the Opinion works an "expansion" of foreign affairs preemption. Pet. 10; Brief of Amici Bet Tzedek Legal Services *et al.* ("Bet Tzedek Br.") 19-27; Brief for the State of California as Amicus Curiae ("Cal. Br.") 5-9. But the Court of Appeals applied settled precedent to invalidate a singularly aggressive intrusion by California into the area of war resolution. The Opinion closely tracks the limited field preemption approach suggested in *Garamendi*. Its result was fairly dictated by the Circuit's decision in *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003), which applied field preemption to invalidate a sister statute, and which this Court declined to review following *Garamendi*.

This case is also a poor vehicle for considering the "continued validity" of foreign affairs field preemption (Pet. 10). Petitioner's Section 354.3 action would be independently barred under conflict preemption principles. It is undisputed that the United States recovered the subject paintings and returned them to The Netherlands in accordance with the federal government's policy of "external restitution." Under that policy, American forces returned Nazi-looted artworks to their countries of origin, which were then responsible for individual restitution. By allowing Petitioner to second-guess Dutch restitution proceedings, her Section 354.3 action would defeat the purpose of this policy.

STATEMENT

1. Section 354.3 provides that any owner of "Holocaust-era artwork[] may bring an action to recover Holocaust-era artwork" from "any museum or gallery" exhibiting art. § 354.3(b), (a)(1). The California Legislature framed the injury it sought to

remedy in historical terms, defining "Holocaust-era artwork" to mean "any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive." *Id.* § (a)(2). The statute permits these claims to be brought even if they would otherwise be time-barred: "Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010." *Id.* § (c).

The California Legislature made clear that Section 354.3's purpose was to aid "[t]housands of victims of Nazi persecution" by redressing the looting suffered during World War II. 2002 Cal. Stat. Ch. 332, § 1(b). Although the statute's legislative findings purport to focus on "residents of the State of California" *ibid.*, the Legislature made a considered decision to extend the statute's reach to plaintiffs and defendants beyond the State's borders. The statute does not limit Holocaust art plaintiffs to California residents or citizens, and exempts them from California's borrowing law for statutes of limitations. *See* § 354.3(b) ("Section 361 does not apply to this section."). In both these respects, the Legislature departed from the claim-reviving statutes it cited as models. *See* Sen. Jud. Comm., Analysis of Assem. Bill 1758 (2001-2002 Reg. Sess.) Jun. 25, 2002, at 4. The Legislature also struck language in the original bill that would have limited the eligible defendants to California museums, Pet. App. 23a (citing Sen. Jud. Comm. Analysis, *supra*), making it applicable to "any museum or gallery" regardless of residence, § 354.3(a)(1).

2. Section 354.3 is just one section in a family of California statutes purporting to revive stale claims arising out of historical wrongs. Section 354.4

establishes a cause of action for insurance claims arising out of the Armenian genocide; Section 354.45, for Armenian genocide claims against banks; Section 354.5, for Holocaust insurance claims; and Section 354.6, for slave labor at the hands of "the Nazi regime, its allies and sympathizers." Another provision, Section 354.7, addresses claims arising out of the federal government's "Bracero" program for migrant laborers. These statutes are patterned on the same basic structure, establishing a new claim for an historical injury,[1] and then stripping the defendant of any otherwise-applicable statute of limitations defense for a fixed term.[2]

California viewed Section 354.3 as part of the State's broad-based effort to provide its own remedies for wartime harms. The Legislature invoked two 354-series statutes as models: the provisions reviving Holocaust insurance claims (Section 354.5), and Armenian Genocide claims (Section 354.4). *See* Assem. Jud. Comm., Rep. on Assem. Bill 1758 (2001-2002 Reg. Sess.), at 2. In recommending that then-Governor Davis sign the legislation into law, the Governor's office stressed that California "has been a leader" in providing redress for Holocaust victims. Pet. App. 24a (citing Enrolled Bill Report on Assem.

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[1] *See* Cal. Civ. Proc. Code § 354.4(b) (authorizing "any Armenian Genocide victim" residing in the state to bring a claim on "an insurance policy or policies" issued "in Europe or Asia between 1875 and 1923"); *id.* § 354.45(b) (similar); *id.* 354.5(b) (similar); *id.* § 354.6(b) (similar).

[2] *See* Cal. Civ. Proc. Code § 354.4(c) (action "shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is filed on or before December 31, 2010"); *id.* § 354.5(c) (same); *id.* § 354.6(c) (same); *id.* § 354.45 (similar; action must be filed "on or before December 31, 2016").

Bill 1758 (2001-2002) Reg. Sess. Aug. 1, 2002).

3. The 354-series statutes and related California laws redressing war injuries have been uniformly invalidated under the foreign affairs doctrine.

In *Deutsch*, the Ninth Circuit struck down Section 354.6, the provision reviving slave labor claims arising out of World War II. 324 F.3d 692. In enacting Section 354.6, the Court reasoned, California had created a "special class of tort actions, with the aim of rectifying wartime wrongs committed by our enemies." *Id.* at 708. Applying field preemption principles, the Court held that the statute "intrude[d] on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." *Id* at 712.

While the *Deutsch* plaintiffs' petitions for certiorari were pending, this Court issued its ruling in *Garamendi*, which invalidated another California statute relating to injuries suffered in World War II. *Compare Garamendi*, 539 U.S. 440 (June 23, 2003) *with* Pet. for Cert., *Ma v. Kajima Corp.*, No. 02-1778 (June 4, 2003); Pet. for Cert., *Saldajeno v. Ishihara Sangyo Kaisha Ltd.*, No. 02-1784 (June 4, 2003); Pet. for Cert., *Kim v. Ishikawajima Harima Heavy Indus.*, No. 02-1773 (June 2, 2003); Pet for Cert., *Tenney v. Mitsui & Co.*, No. 02-1775 (June 4, 2003). In their briefs, the *Deutsch* plaintiffs and amici advanced the same grounds for review urged by Petitioner here. They argued that *Deutsch* "present[ed] the Court with the opportunity to complete the foreign affairs analysis it began in *Garamendi*" (Brief of State of Cal. as Amicus Curiae, *Tenney*, *supra*, at 8), because it "raise[d] the very question" about field preemption reserved in that case (Reply Brief, *Tenney*, *supra*; *accord* Reply Brief, *Kim*, *supra*, at 4 ("this Court

should accept review to resolve the question left unanswered in *Garamendi*")). This Court denied each of the petitions. *See* 540 U.S. 820-21 (2003).

In the wake of *Garamendi* and *Deutsch*, the lower state and federal courts have struck down five of the six 354-series statutes: Section 354.4, reviving Armenian genocide claims, *see Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1063 (9th Cir. 2009), *pet. for reh'g en banc pending*; Section 354.45, reviving Armenian genocide bank claims, *see Deirmenjian v. Deutsche Bank AG*, 526 F. Supp. 2d 1068, 1089 (C.D. Cal. 2007); Section 354.5, reviving Holocaust insurance claims, *see Steinberg v. Int'l Comm'n on Holocaust-Era Ins. Claims*, 34 Cal. Rptr. 3d 944, 952-53 (Ct. App. 2005); and Section 354.6, the slave labor provision, *Taiheiyo Cement Corp. v. Superior Court*, 12 Cal. Rptr. 3d 32, 41 (Ct. App. 2004) (concurring with *Deutsch*). The sole surviving 354 statute, Section 354.7, is the one that does *not* address claims for injuries suffered in foreign-war persecution. *See Cruz v. United States*, 387 F. Supp. 2d 1057, 1076 (N.D. Cal. 2005) (upholding claim for federal migrant laborer program).

4. Despite the gathering 354 invalidations, Petitioner brought a Section 354.3 action against the Museum. Pet. App. 8a.

a. Petitioner seeks recovery of *Adam* and *Eve*, a pair of medieval panels by Lucas Cranach the Elder. The Norton Simon foundations acquired the panels in 1970-71, and have continuously displayed them at the Norton Simon Museum of Art at Pasadena since 1979. *Ibid.*; Appellants' Excerpts of Record in CA9 ("ER") 277-78.

b. The underlying ownership dispute over the Cranachs centers on two acts of looting and two

prior restitution proceedings in The Netherlands.

According to Petitioner, the Soviet Union seized the Cranachs from a church in the 1920s. Compl. ¶ 11. The Soviets sold the Cranachs in 1931 as part of an auction titled "the Stroganoff Collection," which featured artworks from the noble Stroganoff house. *Id.* ¶ 13. Over the Stroganoff family's protest, the Cranachs were purchased by Petitioner's predecessor-in-interest, a prominent Dutch art dealer named Jacques Goudstikker. *Ibid.*; *see also Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 20 (S.D.N.Y. 1976).

In 1940, Nazi Germany invaded The Netherlands, and Goudstikker was forced to flee with his family. Pet. App. 9a. The inventory of Goudstikker's gallery, including the Cranachs, were forcibly sold to Hermann Göring, Reichsmarschall of the Third Reich. *Ibid.* The United States Army recovered the Cranachs and other works looted by Göring in Germany at the close of the war. *Ibid.* In 1946, the United States returned the Cranachs and other works from the Goudstikker collection to The Netherlands. *Id* at 9a-10a.

c. It is undisputed that the United States returned the Cranachs to The Netherlands as part of the federal government's "external restitution policy." Pet. App. 19a; Compl. ¶ 22. Under that policy, the United States restituted recovered artworks to their countries of origin, and not to individual owners. Pet. App. 16a (citing Presidential Advisory Commission on Holocaust Assets in the United States, Plunder and Restitution: The U.S. and Holocaust Victims Assets (2000) ("Plunder & Restitution")). President Truman formally adopted the policy at the Potsdam Conference to deal with looted artworks recovered by

American forces. *Ibid.*

The policy was the outgrowth of the London Declaration of January 5, 1943, by which Allied nations—including the United States and The Netherlands—reserved the right to invalidate wartime transfers of property. Pet. App. 15a. To formulate the United States' policy on looted art, the State Department established an inter-agency committee. Pet. App. 17a; *see also* Plunder & Restitution SR-139. The committee considered individual restitution and other options, but ultimately decided in favor of restitution to the country of origin. Pet. App. 16a. "The question of restoration to individual owners," the committee concluded, "is a matter for these governments to handle in whatever way they see fit." Plunder & Restitution SR-140 (quoting Memo from Interdivisional Comm. on Rep., Rest., & Prop. Rights, Subcomm. 6, Apr. 10, 1944); *accord* Pet. App. 17a. The committee determined that the originating country was best situated to resolve complex issues of individual ownership, and to dispose of the works if no owner could be found. *Ibid.* Upon transferring the works, the United States was to have no further role in the restitution process. *Ibid.*

President Truman formally approved this external restitution policy, as set forth in a statement titled "Art Objects in the U.S. Zone," on July 29, 1945. Pet. App. 16a. American occupying forces implemented the policy under the order of General Dwight D. Eisenhower, Military Governor of the American Occupation Zone. *Id.* at 4. The United States set the deadline for filing claims for April 1948, finding that three years was sufficient time, absent concealment, for countries to file claims. Plunder & Restitution SR-143.

d. Following the war, Goudstikker's widow initiated formal restitution proceedings in The Netherlands. Compl. ¶ 23. Ms. Goudstikker eventually reached a settlement with the Dutch government for certain real and personal property forcibly sold to the Nazis. Supplemental Excerpts of Record in CA9 ("SER") 146. Under protest, however, she chose not to seek the return of the Goudstikker artworks, which would have required her to return the money paid by Göring for those works. SER 151-52. The time to file a claim under Dutch law elapsed in 1951. *Ibid.*

e. A decade after the Goudstikker restitution proceedings were concluded, the Stroganoff heir filed a restitution claim with The Netherlands for the Cranachs and other works. Pet. App. 10a. In 1966, the Dutch government transferred the Cranachs to Stroganoff as part of a settlement that included a monetary payment. *Ibid.*; Compl. ¶ 30. Stroganoff sold the Cranachs to the Norton Simon foundations in 1970-71. *Ibid.*

5. Petitioner became the successor-in-interest to Jacques Goudstikker in 1996. Compl. ¶ 35. In 1998, she filed a new restitution claim with the Dutch government, seeking return of the Goudstikker artworks recovered by the Allies. SER 147, 151-52. Both the government and the Court of Appeals for the Hague denied the claim as time-barred, and rejected Petitioner's challenges to the 1950s restitution proceedings. *Ibid.* In 2004, however, the Dutch government decided to "depart from a purely legal approach" to restitution, later returning 200 paintings to Petitioner on "moral" grounds. ER 60-62.

6. After Petitioner filed suit in this case, the

district court granted the Museum's motion to dismiss. The district court held that the foreign affairs doctrine preempted Section 354.3, and that Petitioner's action was otherwise time-barred. Pet. App. C.

The Ninth Circuit affirmed the preemption holding. The Court first considered and rejected the Museum's conflict preemption challenge. While recognizing that Section 354.3 "would have directly conflicted with the federal government's policy of external restitution" in the post-war period, the Court believed conflict preemption inapplicable because the policy is "no longer in effect." Pet. App. 19a. The Court nonetheless held Section 354.3 unconstitutional because it "infringe[d] on the national government's exclusive foreign affairs powers." *Id.* at 4a. The "documented history of federal action addressing the subject of Nazi-looted art," including external restitution, made the federal government's presence "so comprehensive and pervasive as to leave no room for state legislation." *Id.* at 28a-29a. Nor could California make any "serious claim to be addressing a traditional state responsibility." *Id.* at 24a. By adopting Section 354.3, the Court explained, California intended to create a "world-wide forum for the resolution of Holocaust restitution claims." *Id.* at 25a, 23a.

Judge Pregerson dissented. Pet. App. 36a-38a. Petitioner filed a petition for panel rehearing and/or rehearing en banc. Apart from Judge Pregerson, "[n]o judge requested rehearing en banc." *Id.* at 3a.

REASONS FOR DENYING THE PETITION

The Opinion below is the latest in a line of federal and state decisions striking down nearly identical California statutes on foreign affairs preemption grounds. Like those decisions, the Court of Appeals held that Section 354.3 intruded upon the federal government's foreign relations power by attempting to furnish its own resolution of war claims. The Ninth Circuit arrived at this result by applying the Court's most recent decision on foreign affairs preemption, *Garamendi*, and the Circuit's prior field preemption decision in *Deutsch*, which invalidated a statute on which 354.3 was modeled.

Petitioner identifies no systemic or compelling reason to disrupt the consensus that California has overstepped its constitutional authority. Section 354.3 is set to expire this year. The Petition references only one other pending lawsuit that implicates Section 354.3, and points to no statutes outside of California that would be affected by the Opinion below. The Petition focuses heavily on *Garamendi*, yet identifies no division of authority on that decision warranting intervention.

The questions presented are, moreover, unworthy of review even on their own terms. Petitioner's lead arguments center on whether the Court of Appeals correctly construed Section 354.3 in concluding it (1) did not address a traditional state interest (Pet. 11-20); and (2) constituted an impermissible effort "to rectify[] wartime wrongs" (*id.* at 21 (citation omitted)). Both arguments are intertwined with state-law issues of statutory construction, which cannot support certiorari. These issues were also correctly resolved by the Court of Appeals. The text and legislative history of Section 354.3 demonstrate

that California's purpose was not to "provide[] a statute of limitations" (Pet. 21), but to resolve claims arising out of a foreign war. This is not an area of traditional state responsibility under *Garamendi*.

Despite Petitioner's suggestion, the Opinion below presents no occasion to "settle the question" of a "broad foreign affairs field preemption." Pet. 10. This Court just recently considered "the continued validity" of *Zschernig* (*ibid.*) in *Garamendi*, clarifying the boundaries between the field and conflict variants of foreign affairs preemption. The Opinion follows *Garamendi*'s limited approach to field preemption, and comes nowhere close to testing the boundaries of that doctrine. The result reached by the Ninth Circuit flows directly from the Circuit's decision in *Deutsch*—a case where this Court was presented with, and declined to review, the *very same* field preemption challenge posed here. Even if the Court believed it worthwhile to revisit *Garamendi*'s field preemption framework so soon after the decision, this would still be the wrong case for addressing that issue. Because the Court could readily affirm the judgment on conflict preemption grounds, it would be unlikely even to reach field preemption.

I. The Opinion Decides an Issue that Has No Significance Beyond this Case and Creates No Division of Authority

The ruling below does not warrant review for several reasons wholly independent of the specific issues Petitioner raises. The Court of Appeal's holding is narrow and of limited application. It rests firmly on recent authorities, about which there is neither conflict nor confusion. And the result here fits neatly into a line of cases striking down virtually identical statutes.

1. The Opinion's holding has little, if any, relevance beyond this case. The operative provision of Section 354.3(c), which revives stale claims, is set to expire on *December 31 of this year*. *See* § 354.3(c). Nor is this a situation in which the invalidation of the statute could potentially affect a wide swath of pending litigation. *Cf. United States v. United States Shoe Corp.*, 523 U.S. 360, 365 (1998) (issue presented was raised in more than 4,000 federal cases). The Petition references, and only in passing, just *one* pending Holocaust art case that depends upon Section 354.3. Pet. 26, n.9 (citing *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009)). That is the only other 354.3 claim Respondents have been able to identify, *see Cassirer v. Stephen Hahn*, No. 1158698 (Cal. Super. Ct. July 15, 2005) (order dismissing overlapping state court action), and independent bars may prevent that suit from going forward, *see* 580 F.3d at 1064 (applying exhaustion requirements under the Foreign Sovereign Immunities Act), *reh'g en banc granted*, 590 F.3d 981 (9th Cir. 2009). Nothing suggests there will be a spate of new lawsuits in the next six months.

The concern that the Opinion "may well impede the enactment of similar statutes in other states" (Pet. 20) is entirely hypothetical. Neither Petitioner nor her amici have identified any other state that has sought to resolve claims for Nazi-looted art. The most Petitioner can do is compare Section 354.3 to state tax and education statutes providing benefits to Holocaust victims. Pet. 22-23. Such laws are unaffected by the holding below, since they do not purport to resolve claims or impose liability for war-related injuries. *Post* at 23-24. And the states in other circuits would not be bound by the Opinion below in any event.

2. None of the issues raised by Petitioner is marked by the sort of confusion or conflict that would justify this Court's intervention.

Petitioner does not even contend that the Opinion conflicts with a decision issued by another Court of Appeals. *See* Sup. Ct. R. 10(a). The Petition centers on *Garamendi,* questioning whether the Court of Appeals "misconstrued" that decision or improperly expanded its preemption analysis. Pet. 10, 29. Yet, outside the Ninth Circuit's rulings below and in *Movsesian*, there are only two Court of Appeals opinions applying *Garamendi*'s preemption analysis: *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113 (2d Cir. 2010), and *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009). Both decisions invoked *Garamendi* to hold that the foreign affairs doctrine preempted state law claims for war-related injuries. *See Generali*, 592 F.3d at 119-20 (deeming preempted state law claims against Italian insurer for Holocaust-era benefits); *Saleh*, 580 F.3d at 12-13 (holding preempted common law claims against defense contractors for abuse suffered in Iraqi prison). The outcomes in these cases are thus fully consistent with the ruling below.

Petitioner similarly cannot show that the ruling below conflicts "with a decision by a state court of last resort." Sup. Ct. R. 10(a). The only state Supreme Court decision addressing *Garamendi* was the Texas Court of Criminal Appeal's decision in *Medellin*. *See Ex Parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006). That decision already has been reviewed by this Court, *see Medellin v. Texas*, 552 U.S. 491 (2008), and its holding focused on separation of powers concerns rather than the federalism principles that drove *Garamendi*, *id.* at 533.

Only a handful of state intermediate court opinions apply *Garamendi*, and most of those involve challenges to California's 354-series provisions. The California cases are uniform, with the Court of Appeal invalidating each of the statutes reviving claims for injuries suffered in foreign wars. *See Steinberg*, 34 Cal. Rptr. 3d at 952-53; *Taiheiyo*, 12 Cal. Rptr. 3d at 42-46; *Mitsubishi Materials Corp. v. Superior Court*, 6 Cal. Rptr. 3d 159, 162-63 (Ct. App. 2003). These decisions join other federal court decisions that have likewise invalidated California's war-remedies provisions, *see Movsesian*, 578 F.3d at 1063; *Deirmenjian*, 526 F. Supp. 2d at 1089, sparing only the provision that involves a *domestic* labor program, *Cruz*, 387 F. Supp. 2d at 1076.

Were this Court to grant review, then, it would be providing guidance on issues that are significant only in the dispute between the parties and possibly one or two other cases involving looted artwork. That is not a "compelling reason[]" to grant review. Sup. Ct. R. 10.

II. The Court of Appeals Correctly Held that Section 354.3 Does Not Address a Traditional State Interest

The principal issue raised by Petitioner is whether the Court of Appeals erred in holding that California was not acting in an area of traditional state responsibility when it adopted Section 354.3. Pet. i, 11-20. According to Petitioner, the Ninth Circuit "misconstru[ed] *Garamendi* and the legislative history of § 354.3" when it concluded that California had impermissibly attempted "to 'create[] a world-wide forum for the resolution of Holocaust-restitution claims.'" *Id.* at 11 (capitalization and citation omitted).

1. This is a manifestly inadequate ground for review. The Court does not grant certiorari to review issues centering on the proper interpretation of state law. *See Thomas v. American Home Prods.*, 519 U.S. 913, 916 (1996) ("[T]his Court's function, generally speaking, is not to correct federal courts' misapplications of state law[.]"). Whether California's enactment of Section 354.3 exceeds its "traditional competence" under *Garamendi* turns on the scope and purpose of that statute. That is why Petitioner devotes an entire section of the Petition (Pet. 16-20) to challenging the Opinion's construction of Section 354.3. She asks the Court to review whether the Court of Appeals "divine[d] a legislative intent belied by the legislative record" (*id.* at 9), and thus "mischaracterized" its purpose (*id.* at 11). But when a federal issue is intertwined with a state-law construction issue, the Court ordinarily "defer[s] to the construction of a statute given it by the lower federal court." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985).

2. Even apart from this fundamental defect, the Court of Appeals' construction and analysis of Section 354.3 is unworthy of review. The Opinion below applies, in straightforward fashion, *Garamendi*'s assessment of one California Holocaust statute to another statute aimed even more directly at furnishing a remedy for Holocaust-related injuries.

a. *Garamendi* involved a California disclosure law related to Section 354.5, the statute reviving Holocaust insurance claims. The Holocaust Victim Insurance Relief Act of 1999 ("HVIRA") required insurers doing business in California to disclose information about Holocaust-era policies. 539 U.S. at 409. The "HVIRA was meant to enhance enforcement of [Section 354.5]," and both provisions

were enacted as part of the same bill. *Id.* at 410; *see also id.* at 423. This Court held that the statute conflicted with the federal government's policy on Holocaust insurance claims. *Id.* at 425-26. The Executive branch, the Court explained, had entered into agreements with Germany and other countries to resolve Holocaust insurance claims through a voluntary fund. *Id.* at 421-22. By "providing regulatory sanctions to compel disclosure," California took a "different tack" from the federal government. *Ibid.*

While deciding the case on conflict preemption principles, the Court recognized "the contrasting theories of field and conflict preemption evident in [its prior decision] in *Zschernig* [*v. Miller*, 389 U.S. 429 (1968)]." 539 U.S. at 419. In *Zschernig*, this Court held preempted an Oregon probate statute that invited judicial criticism of communist regimes. 389 U.S. at 432. The statute, the majority reasoned, constituted an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Ibid.* Justice Harlan, writing separately, suggested that foreign affairs preemption be limited to cases involving "conflicting federal policy." *Id.* at 458-59 (concurring opinion). The *Garamendi* Court proposed treating field and conflict preemption as "complementary," with field preemption applying when the state has "no serious claim to be addressing a traditional state responsibility," and conflict preemption applying, along a sliding scale, when it acts within its "'traditional competence.'" 539 U.S. at 419 (quoting *Zschernig*, 389 U.S. at 459 (Harlan, J., concurring")).

After analyzing the conflict between HVIRA and federal policy, the Court went on to note "the weakness of the State's interest, against the backdrop

of traditional state subject matter." *Id.* at 425. California had argued that HVIRA was intended to advance a "legitimate consumer protection interest" in the treatment of Holocaust insurance claims. *Id.* at 426. The Court rejected that interest, concluding that HVIRA was actually grounded in "concern for the several thousand Holocaust survivors said to be living in the state." *Ibid.*

b. Petitioner insists that *Garamendi* deemed California's interest in HVIRA weak because the State was "imposing its insurance regulations" upon companies and transactions "having no connection with the state." Pet. 14-15. But *Garamendi* expressed no concerns about extraterritoriality, and for good reason: the HVIRA applied to insurance companies *doing business* in the State of California. Indeed, the "iron fist" wielded by California was the "mandatory penalty" of "suspension of the company's license to do business in the State." 539 U.S. at 410. The weakness of California's interest flowed not from extraterritoriality, but from the State's effort to reach beyond "traditional state legislative subject matter," by focusing on Holocaust-related insurance claims. *Id.* at 425.

c. In the same vein, Petitioner suggests that the Court of Appeals found California's interest in Section 354.3 weak only because the Legislature "did not limit the scope of § 354.3 to museums and galleries physically located in California." Pet. 15, 2. The point is irrelevant and wrong. It is irrelevant because *Garamendi* struck down the HVIRA notwithstanding its express limitation to insurance companies operating in California and "Holocaust survivors resid[ing] in California." 539 U.S. at 425.

The point is wrong because Petitioner fundamentally misreads the Opinion below. The Ninth Circuit found that California lacked a traditional legislative interest because it sought to create its own war remedy, "express[ing] its dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of World War II." Pet. App. 24a. The Court cited the State's decision to reach beyond California museums not because that extraterritorial reach itself rendered the statute unconstitutional, but as *evidence* that the State had improperly legislated a scheme for resolving war-related claims. "The scope of the statute," the Court explained, "belies California's purported interest in protecting its residents and regulating its art trade." *Id.* at 23a. That reasoning tracks precisely *Garamendi*'s reasoning that California's focus on Holocaust victims "raise[d] great doubt that the purpose of the California law is an evaluation of corporate reliability in contemporary insuring." 539 U.S. at 426.

The Court of Appeals was assuredly right on this score. Viewed against other 354-series statutes, Section 354.3 reflects a considered judgment by California to "create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the State." Pet. App. 23a. As the Opinion notes (*ibid.*), the California Legislature struck language in the original bill that would have limited eligible defendants to California museums. With respect to plaintiffs, Section 354.3 departs from other 354-series statutes in two ways: (1) it does not limit eligible plaintiffs to California residents; and (2) it exempts Holocaust art claimants from California's borrowing law for statutes of limitations. *Compare*,

e.g., Cal. Civ. Proc. Code § 354.4. The Legislature understood and intended both of these expansions. ER 114-15.

That California sought to subject out-of-state museums to suit within Due Process limitations (Pet. 17-18) cannot legitimate the State's aggrandizing purpose. Due Process is an independent bar; California's decision to abide by it does not prove the State is legislating in a traditional area. To the contrary, the Legislature drew up Section 354.3 with the express goal of "provid[ing] a venue to victims of Nazi persecution elsewhere in the country whose states have not authorized such suits." ER 114. That goal fits hand-in-glove with California's effort to establish its own resolution of World War II claims.

3. California's incursion into the field of war remedies is hardly saved because it chose to revive stale claims and "extend the time in which claims for stolen property can be asserted." Pet. 19. Even accepting that "establishment of a statute of limitations" is "a traditional state responsibility," a claim-reviving statute that "effectively singles out only [artworks looted by Nazi Germany] at least 55 years ago" is not. *Cf. Garamendi*, 539 U.S. at 426. What is more, Petitioner is wrong to suggest that Section 354.3 merely extends the limitations period, or that reviving decades-old claims is even something within a state's "traditional competence," *id.* at 419. n.11. Section 354.3 "creates a new cause of action," thereby reviving potential liability and retroactively negating time bars. Pet. App. 26a. The statute is therefore "substantive in nature," and not "merely procedural." *Deutsch*, 324 F.3d at 707-08. Indeed, as the Ninth Circuit observed in *Deutsch*, California's novel claim-reviving approach "raise[s] serious due process questions." *Id.*

III. The Court of Appeals Properly Treated Section 354.3 as an Effort by California to Provide Its Own Resolution of War Claims

Petitioner argues that the Court of Appeals erred in holding that "§ 354.3 is unconstitutional because it was enacted 'with the aim of rectifying wartime wrongs committed by our enemies.'" Pet. 21. This argument takes as given "the foreign affairs field preemption doctrine" addressed in *Garamendi*, and challenges only the Court of Appeals' conclusion that Section 354.3 contravenes that doctrine. *Ibid.*

1. Like her first issue, Petitioner's challenge to the Court of Appeals' field preemption analysis turns on a state-law issue of statutory construction. Her main point is that "the majority *interpreted § 354.3 too broadly*" by treating the statute as a war-remedy provision. Pet. 21 (emphasis added). But again, "this Court normally follows lower federal-court interpretations of state law," *Steinberg v. Carhart*, 530 U.S. 914, 940 (2000), and the Ninth Circuit expressly held that "Section 354.3, at its core, concerns restitution for injuries inflicted by the Nazi regime during World War II," Pet. App. 28a.

2. Even if it were appropriate to take up the Petition's state-law statutory construction issues, the Court of Appeals correctly held that Section 354.3 usurps the National Government's "exclusive power to make and resolve war." Pet. App. 26a.

Invoking Judge Pregerson's dissent, Petitioner emphasizes that Section 354.3 "does not target enemies of the United States." Pet. 21. The State's amicus brief makes the same argument. Cal. Br. 10. But *Garamendi* itself held that a statute may violate the foreign affairs doctrine even if it regulates private parties. 539 U.S. at 416 ("wartime claims against

even nominally private entities have become issues in international diplomacy"). The key point, instead, is that Section 354.3 legislates a scheme for resolving claims arising from war, "a power reserved exclusively to the federal government." *Id.* at 25a.

The Court of Appeals properly treated Section 354.3 as a war-remedy statute because its whole purpose is to provide redress for "the victims of Nazi persecution." Ch. 332, § 1(b). The "actionable injury at the heart of the statute is the Nazi theft of art." Pet. App. 26a. The statute is limited to claims for "Holocaust-era artwork," § 354.3(b), and defines that term to mean works "taken as a result of Nazi persecution," *id.* § (a)(1). California's decision to target museums currently possessing looted artworks, and not "enemies of the United States," (Pet. App. 37a (Pregerson, J., dissenting)), in no way alters its war-related purpose. In allowing claims against current possessors, California merely recognized that the wrongs it seeks to rectify occurred during a war that ended 65 years ago. *Id.* at 26a-27a.

On this point, Judge Pregerson's comparison to the 354-series provision invalidated in *Deutsch* (*ibid.*) serves to underscore, rather than undercut, the inference that Section 354.3 aims to redress wartime injuries. That statute permitted lawsuits against "any entity *or successor in interest* thereof, for whom [slave] labor was performed," § 354.6(b) (emphasis added), and the *Deutsch* defendants included American affiliates of foreign corporations, 324 F.3d at 712. Even though it was clear that Section 354.6 applied to parties who were not "enemies of the United States," the *Deutsch* Court did not hesitate to hold the statute preempted.

3. Given that California enacted Section 354.3 for

the purpose of resolving war-related claims, the Court of Appeals was plainly correct in holding that its intrusion on foreign relations was not "purely incidental." Pet. 28.

Although Petitioner repeatedly suggests that the statute somehow operates as a law of general application (Pet. 21-22, 28), the "verboten intent" reflected in the statute's text and legislative history forecloses such treatment (Pet. App. 27a). Section 354.3 is not "completely neutral in its application" (Pet. 28), but depends on the existence of an injury suffered in a foreign war. As noted, the statute does not "merely provide[] a statute of limitations" (*id.* at 21), but creates a new claim to redress specified war injuries. In adopting this remedy, the Legislature not only inserted itself into the field of war resolution, but did so in a direct and aggressive manner, extending its war remedy to out-of-state and even international plaintiffs and defendants.

Because it strikes down a statute that purposefully involves the State in foreign affairs, the Opinion carries no implications for common law claims or other laws of general application.[3] Petitioner and her amici direly predict that the Opinion below threatens "any state statute that provides relief to Holocaust

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[3] Petitioner's reliance on *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), is misplaced. The court there had before it only common law claims, and bracketed the validity of the 354-series statute invoked by the plaintiffs (354.6). *Id.* at 541 n.4, 543. The Ninth Circuit's analysis rested not on the foreign affairs doctrine, but on the political question doctrine and its underlying separation of powers concerns. *Id.* at 561. Even if the Opinion and *Alperin* "cannot be reconciled" (Pet. 22), Petitioner nowhere explains why this purported *intra*-Circuit conflict would justify review.

victims." Pet. 23; Bet Tzedek Br. 23-27. But the virtually identical holding in *Deutsch* has been on the books for several years, and Petitioner points to not a single case striking down a Holocaust tax relief or education statute on the basis of field preemption. And for good reason. Such statutes do not impinge upon the field at issue here—the National Government's power to make and resolve war. *Cf. Garamendi*, 539 U.S. at 421 ("[v]indicating victims injured by acts ... in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding"). Rather, they represent an exercise of the state's taxing and spending powers. Because these are core state government functions, they would be subject to conflict preemption under *Garamendi*'s proposed approach to foreign affairs preemption. 539 U.S. at 419 n.11; *cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (reviewing state law restricting purchase of goods and services for conflict with federal policy).

Statutes that generally toll limitations periods during wartime (Pet. 22-23) are similarly unaffected by the Opinion below, for they do not purport to provide remedies for specific war-related injuries. In marked contrast to Section 354.3, these statutes specify no particular war, class of victim, or type of injury, and thus express no policy with respect to how any given war claims ought to be resolved. *Cf.* Pet. App. 24a. And because such provisions operate only *prospectively*, extending the limitations period on *existing* claims, they are more clearly "procedural" in nature. *Deutsch*, 324 F.3d at 708. Section 354.3 is fundamentally different in this respect, as it *retroactively* strips defendants of limitations defenses. *Id.* at 707-08.

IV. The Opinion Below Presents No Occasion to "Reexamine" Foreign Affairs Preemption

Petitioner's final argument is that "it is time for the Court to recognize the confusion that *Zschernig* has caused" and to "reexamine" foreign affairs preemption. Pet. 29, 26; *see also* Cal. Br. 5-9. But this Court has already suggested a clarifying and limited approach to that doctrine in *Garamendi*. Because the Opinion below considered and applied *Garamendi*'s field preemption framework, it hardly works "an expansion" of the doctrine. Pet. 10. Indeed, the result reached by the Court of Appeals is consistent with the even narrower theory of field preemption suggested in the *Garamendi* dissent.

Even if foreign affairs field preemption required clarification, a grant of certiorari would not advance that goal. The Court could equally invalidate Section 354.3, as applied here, on conflict preemption grounds.

A. The Opinion Follows *Garamendi's* Cautious Approach to Field Preemption, and its Holding is Firmly Grounded in Precedent

1. Petitioner is wrong in suggesting that the Opinion "has taken foreign affairs field preemption farther than *Zschernig* and its progeny." Pet. 27.

Zschernig expressly invoked the negative implications of the federal government's foreign affairs power in holding the challenged statute preempted. "[E]ven in the absence of a treaty," the Court reasoned, "a State's policy may disturb foreign relations." 389 U.S. at 441. Because the government had taken the position that the statute "did not

unduly interfere with the United States' conduct of foreign relations," conflict preemption did not apply. *Id.* at 434 (citations omitted).

The Court's decision in *Garamendi* did not, as Petitioner suggests (Pet. 10), cast doubt on the "continued vitality" of *Zschernig*'s field preemption approach. The *Garamendi* Court merely clarified when field and conflict preemption properly apply, suggesting that field preemption is limited to situations where the state had "no serious claim to be addressing a traditional state responsibility." 539 U.S. at 419. As illustrated by the Court's analysis of HVIRA, this narrow approach to field preemption would still invalidate laws that, like Section 354.3, aggrandize a state's role in foreign affairs. *Id.* at 425-27.

The Opinion accords fully with these principles. Finding no conflict with federal policy, the Court of Appeals examined whether field preemption properly applied under *Garamendi*. The Court concluded that Section 354.3 did not address an area of traditional state authority (Pet. App. 21a-25a), and therefore was "subject to a field preemption analysis" (*id.* at 25a). Thus, even assuming that *Garamendi* set "a limit on the broad dormant foreign affairs doctrine" (Pet. 29), the holding below falls well within that limitation. And while Petitioner attempts to dismiss *Garamendi*'s approach as "dictum" (Pet. 14, 16), the Court of Appeals correctly recognized that its rejection of conflict preemption required it to consider the scope of field preemption in this case.

Petitioner's attempt to paint the Opinion as an outlier (Pet. 28) and field preemption as "moribund" (*id.* at 10), also runs headlong into the Ninth Circuit's decision in *Deutsch*. As noted, that decision

invalidated a virtually identical statute seeking "to redress wrongs committed in the course of the Second World War." 324 F.3d at 712. In striking down that provision, the Ninth Circuit expressly invoked *Zschernig* and "dormant foreign affairs preemption." *Id.* at 709 n.6.

2. Citing the dissent in *Garamendi*, Petitioner contends that "*Zschernig* and the notion of 'dormant foreign affairs preemption' may survive only when the state acts to criticize a foreign government." Pet. 29. She then attempts to harmonize this interpretation with the results in other cases, reasoning that the statutes deemed preempted in *Zschernig* and *Deutsch* were "aimed directly at a foreign country" and its foreign policy. *Id.* at 27.

Even under the *Garamendi* dissent's narrow interpretation of *Zschernig*, the degree of California's intrusion into the field of war resolution would make this a strong case for field preemption. In her dissent, Justice Ginsburg concluded that *Zschernig*'s field preemption analysis "resonates most audibly when a state action 'reflect[s] a state policy critical of foreign governments.'" 539 U.S. at 439 (citation omitted). The HVIRA, Justice Ginsburg reasoned, took "no position on any contemporary foreign government and requires no assessment of any existing foreign regime." *Id.* at 440.

Section 354.3, however, is much closer than HVIRA to the statute invalidated in *Zschernig*, for it too "intrude[s] extraordinarily deeply into foreign affairs." 539 U.S. at 440 (Ginsburg, J., dissenting) (citation omitted). The concern with criticism of foreign governments is rooted in its "potential for disruption or embarrassment" in federal foreign relations. *Zschernig*, 389 U.S. at 435. In concluding

that HVIRA did not pose this risk, Justice Ginsburg stressed that the statute "is directed solely at private insurers doing business in California," that it "mandates only information disclosure," and that it did not "authorize litigation." 539 U.S. at 435. Not so with Section 354.3. By each measure, California has taken a more aggressive tack here, creating a new claim, reviving liabilities, and allowing any plaintiff (not just the State) to sue any defendant whose contacts satisfy due process (not just those "doing business" in California).

The "potential for disruption" created by this statute is palpable, even assuming it stops short of creating an actual conflict with federal policy. *Cf. Zschernig*, 539 U.S. at 440. The breadth of the minimum contacts test means California could readily obtain jurisdiction over many museums abroad, a point the Legislature well understood. Pet. 16-18. Because European governments "often have full responsibility for the majority of museums" (ER 13), Section 354.3 lawsuits pose a real threat of hailing European governments into California courts.

As this case illustrates (Pet. App. 28a), the statute also invites lawsuits challenging post-war restitutions, which carry two distinct implications for United States foreign policy. First, Petitioner's collateral attack on Allied restitution proceedings would contravene the United States' external restitution policy. *Post* at 29-31. Second, such collateral attacks threaten to complicate the government's relationship with those Allied governments. Indeed, in her briefs below and before the Dutch courts, Petitioner specifically charged the Dutch government with violating international law. Appellees' CA9 Opening Br. 9-10; SER 152.

These risks inhere in Section 354.3, which is all that matters for field preemption. That Petitioner's claims might independently create diplomatic tension or invoke other bars (*e.g.*, act of state principles) does not blunt the statute's intrusion into foreign affairs.

B. Even if the Court Were Disposed to Choose Between Field and Conflict Preemption, this Case Would Be a Poor Vehicle for Doing So

Even if the Court were inclined to reconsider the relationship between field and conflict preemption, this case would be the wrong vehicle. Here, as in *Garamendi*, that question "requires no answer," 539 U.S. at 419, because this Court could affirm on the basis of the conflict between Section 354.3 and the federal government's policy on recovered artworks. By awaiting a case that raises the scope of field preemption more cleanly, this Court would benefit from further development in the lower courts.

1. This case presents no need or occasion to consider a "broad foreign affairs field preemption" (Pet. 10) because Petitioner's Section 354.3 action conflicts directly with the United States' external restitution policy.

a. There is no serious dispute that the paintings at issue were subject to an express federal policy. The parties agree that at the end of World War II, the United States adopted a policy of external restitution for recovered artworks. Pet. App. 5a-6a; Pet. 5; CA9 Reply Br. 13-14. The parties also agree that the government in fact carried out this policy with respect to the Cranachs by returning them to The Netherlands. Pet. App. 28a; Pet. 5; Compl. ¶ 22. The Goudstikker family then initiated restitution

proceedings in The Netherlands. Pet. 5; SER 146-47. They recovered substantial property, but chose not to seek return of the Cranachs. *Ibid.*

Were it to reach the issue, the Court could hold that Petitioner's Section 354.3 action conflicts with external restitution. The policy provided that the United States would return recovered artworks to the countries of origin "to handle restitution in whatever way they see fit." Pet. App. 17a (citation omitted). The United States was to play no further role once it transferred the artworks. *Ibid.* By allowing Petitioner to collaterally attack the Dutch government's restitution proceedings decades after the fact, Section 354.3 would nullify this policy. As applied here, the statute would substitute American litigation for Dutch restitution proceedings, which is just the sort of American involvement external restitution sought to avoid; its core principle was that "no attempt should be made to make restitution available to the original owners individually." Plunder & Restitution SR-140(citation omitted).

The Court of Appeals acknowledged the existence and scope of federal external restitution policy. Pet. App. 18a-19a. And it recognized that Section 354.3 was, in substance, at odds with that policy. *Ibid.* The only reason the Court declined to find a conflict was because it believed the policy "was no longer in effect." *Id.* at 19a. That observation is a non-sequitur; what matters is that external restitution legally and factually controlled the events material to the dispute here.

The United States carried out external restitution *with respect to the Cranachs*. That policy, and the Dutch restitution proceedings that followed, are also at the root of the title dispute, as Petitioner appears

to concede. Pet. 30. The Museum traces its title to the Dutch government's transfer to Stroganoff; Petitioner has challenged that transfer, arguing that the Cranachs should have been returned to the Goudstikker family as part of the 1950s restitution. Compl. ¶ 30; SER 152. The federal government's decision to end restitution under the policy in 1948, after the Cranachs had already been returned, hardly opened the door to alternative state remedies. The government decided that countries-of-origin had had enough time to submit claims. The application of that time bar ended the United States' involvement in the restitution of recovered art. To treat the termination as inviting future involvement by individual states would undermine the government's chosen remedy for recovered art, and defeat its related time restrictions.

b. Despite quoting at length from policy statements, Petitioner offers no support for her claim that the United States has backed away from external restitution, much less that it has endorsed private actions, in American courts, to challenge the Allied restitutions. Pet. 23-26. There is none.

First, none of the policy statements cited by Petitioner addresses the subject of this lawsuit: artworks subject to external restitution. The Terezin Declaration and the Washington Declaration nowhere mention external restitution. Nor do they consider the effect of past restitution proceedings on contemporary ownership claims. The text of these declarations shows, instead, that they are focused on more general problems of finding Nazi-looted (not restituted) artworks, and providing mechanisms for resolving claims to them. Indeed, the Washington Principles make clear that they address "art that had been confiscated by the Nazis and *not* subsequently

restituted." These policies simply have nothing to say about the Cranachs, and the federal policies governing their return to The Netherlands.

Second, the Terezin Declaration and Washington Principles—both non-binding—do not support Petitioner's claim that the United States has a policy of having restitution disputes "resolved in court." Pet. 23. To the contrary, both declarations stress alternative dispute resolution, and not litigation, as the preferred means of resolving disputes. *Cf. Garamendi*, 539 U.S. at 421 (federal preference for voluntary insurance settlements over litigation). The Washington Principles encouraged nations to develop "alternative dispute resolution mechanisms for resolving ownership issues." In the same Prague Conference remarks cited by Petitioner, Ambassador Eizenstat exhorted conference participants to support the Washington Principles' "emphasis on alternative dispute resolution," noting that "too many [art claims] result in litigation."

Nothing in the Terezin Declaration suggests the federal government "left to the states" the task of "enacting legislation" to facilitate the litigation of Holocaust claims. Pet. 25. The Declaration takes no policy position on the remedies available in the United States, much less on the proper allocation of state and federal responsibility. It merely establishes general goals for participating nations, urging them to "facilitate just and fair solutions" and dispositions "based on the facts and merits of the claims." This pronouncement cannot be taken to bless state war-remedy provisions like 354.3, especially given the government's positions on the foreign affairs doctrine. The United States has endorsed foreign affairs field preemption. *See* Brief for the United States, as Amicus Curiae Supporting Petitioner, *American Ins.*

Ass'n v. Garamendi, 539 U.S. 396 (No. 02-722), at 11 ("Th[e] [Constitution's] provisions serve to set matters of foreign commerce, foreign relations, and war in a field apart. It is a field that the States may not enter."). And it has opposed California's incursion into this field. *Id.* at 7 n.3 (arguing that HVIRA was preempted and noting that "California has enacted other laws" remedying World War II-related harms, citing, *inter alia*, Section 354.3).

Third, Ambassador Eizenstat's remarks about statute of limitations defenses (Pet. 24) have no bearing on artworks subject to external restitution. This is not a situation "where the claimant has not been provided with provenance information," encountered "difficulty in getting documentation," or was "unaware or only partially aware of [her] heritage." Pet. 24 (citation omitted). The Cranachs were identified, recovered, and externally restituted by the United States. Petitioner's complaint shows that since the 1940s, her family has possessed an inventory of Goudstikker works and known the recovered works were returned to The Netherlands. In any event, under the dissent Petitioner herself invokes, remarks by non-cabinet officers would be inadequate to override the formal external restitution policy. *Garamendi*, 539 U.S. at 442 (Ginsburg, J.).

2. Regardless of whether this case fairly presents the Petition's third issue, it would be premature to revisit *Garamendi*'s suggested approach to foreign affairs preemption now. *Garamendi* is of recent vintage, and only a few federal and state opinions have applied the decision. Rather than intervening at this nascent stage, the Court should allow the Courts of Appeals to continue applying and refining *Garamendi*'s principles.

C. No Limiting Construction Can Salvage Section 354.3, Which Is Invalid on Its Face

Petitioner's final gambit is to complain that the Ninth Circuit invalidated Section 354.3 on its face and declined to adopt her preferred construction limiting Section 354.3 to museums in California. Pet. 31-32. Again, she asks this Court to review a lower court's construction of state law. And again, she is wrong on the merits.

Even assuming that Section 354.3 would have been valid if confined to California museums, a limiting construction is permissible only if the statute is "readily susceptible" to it. *United States v. Stevens*, 130 S. Ct. 1577, 1581 (2010). Because the California Legislature considered and rejected a version of Section 354.3 limited to California (*ante* at 3), the Ninth Circuit properly declined Petitioner's invitation to "rewrite [the] law," *Stevens*, 130 S. Ct. at 1581.

The Ninth Circuit also correctly invalidated § 354.3 on its face. When a state acts with "verboten intent" (Pet. App. 27a), and steps into a field where it may not tread, it is self-evident that "no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Chamber of Commerce of U.S. v. Lockyer*, 422 F.3d 973, 992 (9th Cir. 2005). Petitioner's attempt to imagine a hypothetical statute, in which California did not act with this impermissible intent, is irrelevant. *Cf. Garamendi*, 539 U.S. at 426 (emphasizing "the state interest *actually* underlying HVIRA") (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respondents.

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15.8, Petitioner Marei von Saher respectfully submits this Supplemental Brief in Support of her Petition for a Writ of Certiorari to bring to the Court's attention new authority not available at the time of Petitioner's last filing that is highly relevant to the Petition and even more clearly demonstrates the need for review by this Court.

On December 10, 2010, the Ninth Circuit Court of Appeals granted rehearing and reversed its prior decision in *Movsesian v. Victoria Versicherung AG*, No. 07-56722, 2010 WL 5028828 (9th Cir. Dec. 10, 2010), a case in which the court considered the constitutionality of Cal. Code Civ. Proc. § 354.4 — a statute that extended the time for victims and their heirs to commence legal actions to recover on insurance claims connected with the Armenian Genocide. At the Ninth Circuit's direction, *Movsesian* and *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. Aug. 19, 2009) (App. 1a-38a), a case in which the court considered the constitutionality of Cal. Code Civ. Proc. § 354.3 — a statute that extended the time for victims and their heirs to bring claims to recover Nazi-looted art — were treated as related cases and argued before the same three-judge panel on the same day.

Decisions in the two cases were handed down nearly simultaneously. The original *Movsesian* decision (which was twice cited by Respondents herein to support their argument in their Brief in Opposition to the Petition for a Writ of Certiorari) found the statute at issue to be unconstitutional because "§ 354.4 conflict[ed] with the Executive Branch's clearly expressed foreign policy," to which the Ninth Circuit gave "preemptive weight."

Movsesian v. Victoria Versicherung AG, 578 F.3d 1052, 1062 (9th Cir. Aug. 20, 2009). The court concluded that the purpose of the statute was "to provide a forum for the victims of the 'Armenian Genocide' and their heirs to seek justice," which it held was "not a permissible state interest" because it "expresse[d] [California's] dissatisfaction with the federal government's chosen foreign policy path." *Id.* at 1062-63. The statute in *Von Saher* was held to be unconstitutional because, although "[t]he statute does not . . . conflict with any current federal policy espoused by the Executive Branch" (App. 19a), it "created a world-wide forum for the resolution of Holocaust restitution claims," which was "not an area of 'traditional state responsibility.'" App. 25a. The Ninth Circuit thus agreed with the District Court's assessment that "§ 354.3 infringes on the national government's exclusive foreign affairs powers." App. 4a.

Both 2009 decisions relied heavily on this Court's opinion in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), but in crucially different ways: in the original *Movsesian* decision, the Ninth Circuit found that an actual conflict with Executive Branch policy preempted § 354.4, but having found no such conflict with § 354.3 in *Von Saher*, the Court focused on the issue of field preemption taken up in *Garamendi* (539 U.S. at 419 n.11). The new *Movsesian* opinion, however, eliminates that distinction.

With the switch of a single vote, the Ninth Circuit has produced a new decision in *Movsesian* that cannot be reconciled with *Von Saher*. Having now decided in *Movsesian*, as it did in *Von Saher*, that there is no actual conflict with federal policy to preempt the California

statute, the Ninth Circuit applied the same test for field preemption from *Garamendi* that it did in *Von Saher*. *Movsesian*, 2010 WL 5028828, at *5. Relying on *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), the Movsesian court reversed its earlier decision and found that § 354.4 falls within a traditional area of state interest and would have only an incidental effect on foreign affairs because insurance claims are "garden variety property claims," not war injuries. *Movsesian*, 2010 WL 5028828, at *5-6. Although § 354.4 permits lawsuits to be brought against insurance companies if they wrote insurance policies in Europe or Asia from 1875 to 1923, so long as traditional standards for jurisdiction are met, the Ninth Circuit now concludes that the statute is constitutional. *Movsesian*, 2010 WL 5028828, at *5. On the other hand, in *Von Saher*, the Ninth Circuit rejected Petitioner's reliance on *Alperin* because there was a statute at issue in *Von Saher*, something that was not present in *Alperin*. App. 27a-28a. The Ninth Circuit has obviously reversed itself on that point in *Movsesian*.

In sum, the two decisions have applied the same legal precedent from footnote 11 in *Garamendi* to virtually identical cases but reached opposite conclusions. If there is no constitutional infirmity in extending the statute of limitations with respect to property claims by victims of the Armenian Genocide and their heirs, then it necessarily follows that extending the statute of limitations for property claims by Holocaust victims and their heirs must be constitutional. More importantly, although the inconsistency is readily apparent and is underscored by the new dissenting opinion in *Movsesian*, the *Movsesian* majority opinion

does not even mention *Von Saher* much less attempt to explain why the two cases should be treated radically differently. The handling of the two cases by the Ninth Circuit can only be described as arbitrary and the resulting inconsistency demonstrates that there was a manifest injustice in *Von Saher*.

We submit that the Ninth Circuit's ruling on field preemption in the new *Movsesian* opinion is the correct one. In any event, the inconsistency is further evidence of the difficulties that the *Garamendi* decision has created for the courts and emphasizes the need for this Court to grant the Petition for a Writ of Certiorari in *Von Saher* and clarify these issues. In the alternative, this Court should grant the Petition for a Writ of Certiorari, vacate the Ninth Circuit's ruling in *Von Saher*, and remand the case for reconsideration.

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THE PETITION SHOULD BE GRANTED

Like the Respondents, the Acting Solicitor General ("Solicitor General") does not address the real issue before the Court: the need to clarify its decisions in *Zschernig v. Miller*, 389 U.S. 429 (1968) and *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) in light of numerous inconsistent interpretations of those decisions. And it is easy to see why.

The Solicitor General finds great benefit in *his* interpretation of the *Garamendi* decision -- attributing greater power to the Federal Government than ever before by arguing that the states' ability to act on any issue that might remotely touch on foreign affairs is preempted. Thus, the Solicitor General is desperate to dissuade this Court from reexamining the foreign affairs field preemption/dormant foreign affairs doctrine, and especially *Garamendi's* resurrection of *Zschernig*.

The Solicitor General extends *Garamendi's* holding well beyond the case itself, ignoring that the preemption found in *Garamendi* was based on "a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." *Medellín v. Texas*, 552 U.S. 491, 531 (2008); *see* Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 331-32 (2009). Indeed, fewer than two weeks ago, in *Chamber of Commerce of the U.S. v. Whiting*, No. 09-115, slip op. at 19 (U.S. May 26, 2011) (amicus brief submitted by Solicitor General in Support of Chamber of Commerce), this Court further clarified that *Garamendi* only concerned state actions that directly interfered with an "international

program" negotiated by the President to address the issue at hand.

But it is not only the Solicitor General who distorts *Garamendi* beyond this Court's limited holding. Following the Ninth Circuit's decision in *Von Saher*, either this case or *Garamendi* has been cited by litigants in no fewer than six petitions for writ of certiorari to this Court on issues of foreign affairs preemption, four of which dealt with Holocaust issues. *See Deuley v. Dyncorp Int'l, Inc.*, 8 A.3d 1156 (Del. 2010); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2010); *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010) and *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010); *In re Assicurazioni Generali, S.p.A.*, 592 F.3d 113 (2d Cir. 2010); *Grosz v. Museum of Modern Art*, 403 Fed. Appx. 575 (2d Cir. 2010). These petitions plainly demonstrate that it is not only the Solicitor General who thinks that *Garamendi* stands for something it does not.

We submit that the Court should revisit *Zschernig* and *Garamendi*, and delineate the scope of the field preemption/dormant foreign affairs doctrine to avoid further confusion among litigants, and more importantly, to prevent the Federal Government from using these decisions to appropriate powers that have traditionally been left to the states. *See* J. Kreder, *State Law Holocaust-Era Art Claims and Federal Executive Power*, 105 Nw. U. L. Rev. Colloquy 315 (2011), http://colloquy.law.northwestern.edu/main/2011/05/state-law-holocaust-era-art-claims-and-federal-executive-power.html.

Garamendi has been cited as "an excellent example of 'doctrine creep.'" B. Denning & M. Ramsey, American

Ins. Assoc. v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 Wm. & Mary L. Rev. 825, 869 (2004). Further, commentators are concerned that it has permitted confusion between, and amalgamation of, the field preemption and dormant foreign affairs doctrines. Denning & Ramsey at 877-78; M. Schaefer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 Seton Hall L. Rev. 201, 288-89 (2001). The process for examining this new combined doctrine is relegated to a balancing test set forth in *Garamendi's* footnote 11, which invites speculation by litigants who exploit language such as "*if* a state were," "field preemption *might* be," and "it *might* make good sense." Denny & Ramsey at 925-26 (emphasis added). Greater clarity is required. *Id.* at 926; Schaefer at 207. *See* C. Pytynia, Note, *Forgive Me, Founding Fathers For I Have Sinned: A Reconciliation Of Foreign Affairs Preemption After* Medellín v. Texas, 43 V and. J. Transnat'l L. 1413, 1429 (2010).

Critically, *Garamendi* states that field preemption should not apply if the state is acting in an area of "traditional state responsibility." *Garamendi*, 539 US at 419 n.11. While statutes of limitations for claims for stolen property are undoubtedly a traditional state responsibility, the Ninth Circuit looked beyond § 354.3, the statute at issue here and its legislative history to ascribe an unstated intent to the California legislature. Using *Garamendi* in this fashion -- to rob the states of their traditional responsibilities by divining a legislative intent nowhere evidenced in the legislative record -- demonstrates the problems caused by some courts' interpretations of this footnote in *Garamendi*.

The Solicitor General repeats many of the Respondents' arguments already refuted by Petitioner. We respectfully refer the Court to Petitioner's prior responses thereto. *Compare* U.S. Br. at 10-11 *with* Pet. at 16-20 and Reply at 11; and U.S. Br. at 12 *with* Pet. at 21-23 and Reply at 5-6.

The Solicitor General also attempts to argue that § 354.3 is preempted by actual conflict. But *Garamendi* concerned state action that "directly interfered with the operation of the federal program." *Whiting* at 19. As shown below, the Solicitor General's attempt to create a "federal program," and then claim that § 354.3 is in conflict with it, flies in the face of over 40 years of Holocaust looted art litigation in this country, as well as authoritative pronouncements by the State Department's Special Envoy for Holocaust Issues and the head of the U.S. Delegation to the Prague Holocaust Era Assets Conference.

The Solicitor General admits that the U.S. has not entered into an executive agreement with any foreign government to resolve contemporary claims for Nazi-looted art. Nevertheless, pre-judging the facts of the case, he has determined that the artworks at issue here were already the subject of a *bona fide* restitution proceeding, and concludes that the U.S. has "a continuing interest in that finality when appropriate actions have been taken by a foreign government concerning the internal restitution of art that was externally restituted" (U.S. Br. at 17) at the end of WWII. Thus, the Solicitor General attempts to set up a conflict with the decades-defunct external restitution policy. *See* Reply at 7-9.

This Court has made clear, however, that the preemptive effect of the executive policy at issue in

Garamendi -- favoring the ICHEIC over California's state statute -- was based on "a narrow set of circumstances," i.e., "the making of executive agreements to settle litigation claims between American citizens and foreign governments or foreign nationals." *Medellín*, 552 U.S. at 531. The post-War external restitution policy was not an effort to settle litigation claims of anyone, and certainly not of American citizens. Whatever internal restitution occurred, or did not occur, obviously was not an act of the U.S. Executive to settle claims. If the U.S. now decides that it has a "continuing interest" in the finality of post-War restitution, this is not an exercise of the "claims-settlement" powers that can preempt state law. *Id.* at 531-32. Indeed, under *Medellín* it seems unlikely that the external restitution policy, even when in force at the War's end, would have preempted the states.

In any event, the Solicitor General mischaracterizes what "internal restitution" actually occurred in the Netherlands. In February 2006, after the Dutch Restitutions Committee comprehensively investigated the Goudstikker case, the State Secretary for the Ministry of Education, Culture and Science decided that the Dutch Government should restitute to Ms. von Saher 200 paintings looted by Göring, and they were returned to Ms. von Saher in February 2007.

The 2006 decision vindicated the actions of Jacques Goudstikker's widow, Désí, in the 1950's, accepting the Restitutions Committee's findings that, among other things: (a) contrary to the previous State Secretary's 1998 decision, Désí's claim to the Göring works had not been settled in 1952 (ER 47-48, 50); (b) Désí had refused the Dutch Government's request that she waive the Göring

claims (ER 47-48); and (c) neither her failure to bring a restitution proceeding for the Göring works in the 1950's nor the 1999 decision of the Court of Appeals of the Hague precluded restitution of these works in 2006 (ER 48-51, 62).[1]

The Committee noted that Dési had complained about the unfair treatment she received at the hands of the Dutch bureaucracy (ER 49) and that "the authorities responsible for the restorations of rights or their agents *wrongfully* created the impression that Goudstikker's loss of possession of the trading stock did not occur involuntarily."[2] ER 50 (emphasis added). A Dutch Government committee that made a more general investigation into post-War restitution procedures came

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1. The Solicitor General is also wrong to suggest that claims to the Cranachs were settled by the 1999 decision, which rejected Ms. von Saher's claim solely on narrow jurisdictional and procedural grounds. It never addressed claims for damages for paintings previously sold by the Dutch Government, and its decision not to exercise its *ex officio* authority "as the legal successor to the [post-War] Council for the Restoration of Rights" (ER 50) was not a decision on the merits, but simply an acknowledgement that, because Dési had decided against bringing a restitution proceeding before the Council in the 1950's, Ms. von Saher could not bring the same proceeding before the successor tribunal in the 1990's. (*Id.*)

2 While acknowledging that Goudstikker's property was expropriated through a forced sale to the Nazis, the Solicitor General nevertheless gratuitously cites the sums paid and even converts them into contemporary dollars to make them appear larger. We assume that the Solicitor General does not mean to imply that Reichsmarschall Göring paid full value for Jewish-owned property or that Goudstikker's heirs should have been satisfied with whatever the Nazis were willing to pay.

to a similar conclusion: "Based on our examination of the documents relating to a great number of post-war claims we must describe the way in which the Netherlands Art Property Foundation generally dealt with the problems of restitution as legalistic, bureaucratic, cold and often even callous." *Recommendations for the Restitution of Works of Art*, Ekkart Committee (Apr. 2001), http://www.herkomstgezocht.nl/download/aanbevelingen2en.doc at 7-8. In light of the Dutch Government's own conclusion that its post-War restitution proceedings were not conducted in good faith, there is no basis for the Solicitor General's contrary position.

What the Solicitor General ignores is the fact that the Göring works in the hands of the Dutch Government were finally restituted to Ms. von Saher, and if the Cranachs had been in the Netherlands, they would have been returned as well. It is this "finality" that he should respect. Indeed, the Dutch Government has expressly confirmed that this lawsuit is of no concern to it: "I confirm to you that the State of the Netherlands is not involved in this dispute. The State is of the opinion that this concerns a dispute between two private parties." *See* Letter sent on behalf of the Dutch Minister for Education, Culture and Science to Ms. von Saher's Dutch counsel.[3]

Moreover, it appears that the Federal Government's left hand does not know what its right hand is doing. For over ten years the U.S. Attorney for the Southern District of New York pursued the civil forfeiture of "Portrait

3. The letter was submitted to the District Court as part of Ms. von Saher's Opp'n to the Mot. to Dismiss, attached as Ex. 1 to the Decl. of Robert Willem Polak.

of Wally," a Nazi-looted painting that was externally restituted to Austria, but was never restituted by Austria to the rightful owner. *See United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 247 (S.D.N.Y. 2009). The *Wally* case makes clear that the U.S. does *not* have a substantial interest in respecting the outcome of another nation's internal restitution when, as in the Goudstikker case, it does not result in the return of the looted art to its rightful owner.

It cannot be disputed that it is the policy of the U.S. that artworks looted by the Nazis should be identified and returned to their pre-War owners. *See Proceedings of the Washington Conference on Holocaust-Era Assets* (J.D. Bindenagel ed. 1999), *available at* http://www.state.gov/www/regions/eur/holocaust/heac.html; Stuart E. Eizenstat, *Imperfect Justice* 192-99 (2003); J. Christian Kennedy, Special Envoy for Holocaust Issues, *The Role of the United States Government in Art Restitution*, Conference in Potsdam Germany (Apr. 23, 2007), http://germany.usembassy.gov/kennedy_speech.html (ER 12). Yet, the Solicitor General implies that litigation to retrieve looted art is somehow outside this policy, contending that neither the Washington Conference Principles on Nazi-Confiscated Art nor the Terezin Declaration takes an explicit position in favor of or against the litigation of claims for Nazi-confiscated art, but rather only encourages alternative dispute resolution.

But, as the State Department has expressly acknowledged, if and when voluntary alternative dispute resolution fails, since there is "no specific role for the federal government in the art restitution process," the claimant "has the option of turning to the courts." *See*

Kennedy at ER 13. Thus, the Solicitor General has grossly misstated the State Department's own interpretation of the Washington Principles and the Terezin Declaration.[4] The Solicitor General also conveniently ignores that fact that the very same person who argued that the California statute at issue in *Garamendi* conflicted with the Federal Government's resolution of Holocaust insurance issues, Ambassador Stuart Eizenstat, has stated that with respect to claims for the recovery of Nazi-looted art, he is "concerned by the tendency of holders of disputed art to seek refuge in statutes of limitation and laches defenses in order to block otherwise meritorious claims." *See* Stuart E. Eizenstat, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference*, Prague Conference on Holocaust Era Assets, Czech Republic (June 28, 2009), http://www.state.gov/p/eur/rls/rm/2009/126158.htm.

The Solicitor General appears to have forgotten that the U.S. convened the Washington Conference because it was well-aware that there were enormous problems with post-War internal restitution procedures and, more specifically, because it knew they had not been undertaken in good faith. In the "Opening Ceremony Remarks," the Chairman of the U.S. Holocaust Memorial Council stated:

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4. Indeed, the Solicitor General's brief is rife with misstatements of the facts, the Petitioner's allegations, and statements of U.S. policy. For example, the Solicitor General states, "The Washington Principles generally encourage the return to its pre-war owner of art that was confiscated by the Nazis and not subsequently restituted *or available to be restituted through bona fide procedures*." U.S. Br. at 18 (emphasis added). The emphasized phrase, for which the Solicitor General offers no citation, appears nowhere in the Washington Principles.

> What really shocked the conscience of the world was the discovery that even after the war, some countries tried to gain materially from this cataclysm by refusing to return to the rightful owners what was justly theirs. The refusal to respond to these rightful claims was a great injustice, a moral wrong which can not be ignored. . . . We are here to make sure that these wrongs are corrected in a just and proper manner.

Proceedings of the Washington Conference 3.

The Solicitor General also concludes, without hearing Petitioner's arguments on the issue, and without the relevant facts before it, that this case will eventually be lost by Petitioner on the basis of the act of state doctrine or considerations of international comity. Though Petitioner remains confident that it will prevail on these issues, they have nothing whatsoever to do with that fact that possessors of Nazi-looted art are using state statutes of limitations to preclude Holocaust victims and their heirs from reclaiming Nazi-looted art. The problem is that the Ninth Circuit and the Solicitor General erroneously believe that the states whose statutes are being used in that way have no right to change them.

This is particularly troubling in light of the decision upon rehearing in *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901 (9th Cir. 2010). Having reversed its conclusion that there was a direct conflict with federal policy, the Ninth Circuit then applied the same test for field preemption from *Garamendi* that it did in *Von Saher*, and found that the California statute extending the statute

of limitations for the heirs of victims of the Armenian Genocide to recover on insurance claims concerned "garden variety property claims" and consequently is not preempted by the field preemption/dormant foreign affairs doctrine. *Movsesian*, 629 F.3d at 908. This grossly disparate outcome alone cries out for a reexamination and clarification of *Garamendi*. *See* Pet'r's First Supp. Br.

Finally, the Solicitor General says that the Court should not grant this petition because Petitioner can now proceed under California's general statute of limitations, and when Respondents argue the unconstitutionality of that statute, and after more years of litigation, Petitioner can again seek this Court's review should she not prevail. Among other things, this short-sighted argument ignores the notion that a unanimously passed law in California should not be lightly cast away without a definitive decision by this Court as to its constitutionality. Indeed, contrary to the Solicitor General's view, this is not just about one family's effort to reclaim its legacy. Holocaust victims residing in other states are entitled to a prompt review of this case to instruct them with respect to their own efforts to have their states pass similar legislation. *See* Br. of Amicus Curiae Commission for Art Recovery.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA and NORTON SIMON ART FOUNDATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, Marei von Saher, respectfully submits this Reply Brief to address new points raised in the Opposition Brief of Respondents, the Norton Simon Museum of Arts at Pasadena and the Norton Simon Art Foundation.

RESPONSES TO RESPONDENTS' BRIEF

I. Bases for Granting the Petition

Respondents devote much of their brief to setting up straw men to knock down. They suggest that Petitioner has failed to show a conflict between the Circuit Courts of Appeal or the lower courts, or that the Ninth Circuit ruling in this case conflicts with a decision of a state court of last resort. Petitioner, however, did not rely on any of those grounds. Rather, certiorari is warranted pursuant to Rule 10(c) of the Rules of the Supreme Court because the Ninth Circuit decided an important federal question in a way that conflicts with the Court's decision in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). "Certiorari is often granted and the matter clarified where the court of appeals has allegedly misconstrued, misapplied, or misconceived an applicable Supreme Court opinion." Eugene Gressman, et al., *Supreme Court Practice* 252 (9th ed. 2007).

Respondents then falsely state that Petitioner argued that the Ninth Circuit erred in its application of *Garamendi* "because it 'misconstru[ed]' the 'legislative history of the California statute.'" Resp. 1. In fact, Petitioner argued that the Ninth Circuit not only misconstrued, misapplied or misconceived *Garamendi*,

but also misconstrued the legislative history of §354.3 in order to justify its erroneous conclusion that California acted outside of its traditional competence. Pet. 14-16.

Petitioner also raised as a basis for certiorari the Ninth Circuit's expansion of foreign affairs field preemption in a case where the only possible effect on foreign affairs is incidental, thus extending, without authority, the field preemption doctrine set forth in *Zschernig v. Miller*, 389 U.S. 429 (1968), and later, in *Garamendi*. Section 354.3, far from aggrandizing a state's role in foreign affairs (Resp. 26), does not address a matter of foreign relations, but rather, only a core state function, the statute of limitations. *See Garamendi*, 539 U.S. at 419 n.11 ("field preemption might be the appropriate doctrine" if the state were to act "on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility").

Respondents argue that this is not the appropriate case in which to elucidate *Zschernig* and the doctrine of foreign affairs field preemption because the Ninth Circuit's erroneous opinion has "little, if any" relevance beyond this case. Resp. 13. This is simply untrue. Ambassador Stuart Eizenstat's recent testimony before the Commission on Security and Cooperation in Europe (the U.S. Helsinki Commission) regarding the results of the June 2009 Prague Conference on Holocaust Era Assets reiterated the policy of the Federal Government as confirmed by its adoption of the Terezin Declaration: "The Terezin Declaration . . . urges that courts and other fora that decide art restitution cases base their decisions on the facts of the individual case rather than relying on technical legal grounds such as statutes of

limitations . . . ." *Holocaust Era Assets — After the Prague Conference, before the Commission on Security and Cooperation in Europe* (May 25, 2010) (Statement of Stuart E. Eizenstat, former U.S. Ambassador to the European Union) ("Eizenstat Testimony"). Plainly, the Ninth Circuit's decision has a great deal of relevance, not only to California and Petitioner, but also to the Federal Government, which pledged its support of the Terezin Declaration. Moreover, one of Petitioner's amici, the Commission for Art Recovery, made clear that, but for the *Von Saher* decision, it would be undertaking a nation-wide initiative to extend statutes of limitations for Holocaust-era claims.

It is also disingenuous for Respondents to argue (Resp. 32) that the Terezin Declaration and the Washington Principles do not support Petitioner's statement that U.S. policy includes having Holocaust art restitution claims resolved in the courts. Not only do Respondents ignore the statements of Ambassador J. Christian Kennedy (Pet. 23), but they fail to address Ambassador Eizenstat's recent testimony, which made clear that, not only is the U.S. policy to have Holocaust restitution cases decided based on their merits, rather than on technical defenses, but to encourage alternatives to litigation, particularly where the objects in question are of lower monetary value. With respect to alternative fora versus litigation, Ambassador Eizenstat testified:

> Such a forum would be particularly well-suited to deal with claims for works of lesser value. This is because most experts believe that claims for high value artworks will inevitability

> go to the court system, since the value of the artwork would justify the expense of a judicial proceeding. . . .

Eizenstat Testimony. Plainly, the Federal Government expects that Holocaust art restitution cases will be heard in U.S. courts and that technical defenses should not be a bar to those cases; exactly what §354.3 is designed to enable.

It is ironic that Respondents cite *In re Assicurazioni Generali, S.p.A.*, 592 F.3d 113 (2d Cir. 2010) as an example of a case where *Garamendi's* preemption analysis was applied. In *Generali*, the Second Circuit Court of Appeals twice sought and received direction from the State Department as to the Federal Government's position and policy before finding that the plaintiffs' claims were preempted by the same presidential policies identified in *Garamendi*. The Ninth Circuit made no effort to ascertain the Federal Government's policy with respect to statutes of limitation for Holocaust art cases, or whether the Federal Government perceived any effect on foreign affairs from §354.3. While we believe the recent pronouncements by the Federal Government leave no doubt as to its policy on Holocaust restitution claims and the statute of limitations, we submit that if the Court needs any clarification as to the policy, it would be appropriate to ask the Federal Government to clarify its position.

II. The Uniqueness of §354.3

Respondents argue that the courts should reflexively hold that §354.3 is unconstitutional merely because certain other statutes passed by the California legislature, which address other claims of victims of the Holocaust or the Armenian Genocide, were held unconstitutional. But these statutes were fundamentally different from §354.3. They addressed very different kinds of claims and actually conflicted with current, identifiable federal policies. Section 354.3 does not; it is perfectly consistent with U.S. policy.

For example, Cal. Code Civ. Proc. §354.6 created a cause of action for victims of WWII slave labor to bring a claim for compensation against any entity, or successor thereto, for whom that labor was performed. That statute differs from §354.3 on many levels. First, §354.6 targets solely the Axis war machine and successor companies that trace their very existence to it. Section 354.3, on the other hand, targets museums and galleries solely because they are in possession of looted art and not because of ties to the Axis war effort. Second, §354.6 seeks compensation for war crimes from those who committed them, whereas §354.3 only extends the statute of limitations for claims for stolen property, irrespective of any relationship to war criminals. Third, unlike §354.6, §354.3 does not create a new cause of action, but merely extends a statute of limitations, as all of the legislative summaries and descriptions of §354.6 demonstrate. Appellees' Supplemental Excerpts of Record in CA9 ("SER") 0155-0162. For example, the description of §354.6 describes it as a bill to

> provide that any slave or forced labor victim of the Second World War, or heir of the victim, may

> bring an action to recover compensation for labor performed without pay between 1929 and 1945 against any person or entity who received the benefit of that labor. It also would extend the statute of limitations for these actions until December 31, 2010.

SER 0155. The same is not true of §354.3. As every one of the summaries and descriptions of California Assembly Bill 1758 (which eventually became §354.3) makes clear, all the legislation does is extend the statute of limitations for suits brought to recover Holocaust era artwork. Appellant's Excerpts of Record in CA9 ("ER") 101, 107, 111, 132. The subject of §354.3 is always set forth as "limitations of actions" and its description given as a bill to "revive and extend the statute of limitations." ER 101, 111. Section 354.3 has no, and was intended to have no, substantive component. It is purely a new statute of limitations designed for a particular type of case. Thus, despite Respondents' false assertion (Resp. 6), Petitioner never brought a "§354.3 action," as there is no such thing. As the complaint in this case makes clear, Petitioner brought claims for replevin, conversion, damages under the California Penal Code, to quiet title and for declaratory relief. ER 276.

Finally, the fact that the Court denied certiorari in connection with the Ninth Circuit's decision in *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003), the case holding California's WWII slave labor statute unconstitutional, is hardly surprising in light of *Garamendi*. The slave labor statute actually conflicted with the same Foundation Agreement policy that preempted the HVIRA in *Garamendi* (Pet. 12-13), as

well as the 1951 San Francisco Peace Treaty with Japan. *Taiheiyo Cement Corp. v. Superior Court*, 117 Cal. App. 4th 380, 390 (Cal. App. 2004). It was, therefore, obvious from *Garamendi* that the statute in *Deutsch* was preempted on the basis of actual conflict, and there was no need to address the issue of field preemption.

III. There is No Actual Conflict

Apparently aware of the precarious nature of the Ninth Circuit's reliance on foreign affairs field preemption in this case, Respondents argue that certiorari should not be granted because, they say, the case should be independently barred under conflict preemption principles, despite the Ninth Circuit's holding to the contrary. Resp. 2. In support, Respondents resurrect their contention, rejected by the Ninth Circuit, that §354.3 is in direct conflict with the post-WWII external restitution policy.

Putting aside the fact that Respondents did not file a cross-petition in connection with the Ninth Circuit's ruling with respect to the inapplicability of external restitution or seek rehearing on this point (despite having sought rehearing on other issues), and the utter lack of any actual conflict, it is plain that the obsolete external restitution policy, which was never intended to be anything more than a temporary solution to a purely logistical problem, has no relevance here.

> "External restitution," as it was known, refers to the *process* whereby U.S. authorities returned certain categories of assets—cultural property, securities, machinery, heavy

> agricultural and industrial equipment, locomotives, rolling stock, barges, transportation equipment, and communication and power equipment — found in Germany or Austria to the governments of the countries from which they were stolen. Assets were restituted once the country of origin could be identified, and missions sent by other governments helped to identify assets that were subject to restitution. In cases where assets were restituted in this manner, the *recipient government bore the responsibility to locate the rightful owner and to restitute the property turned over to it by U.S. authorities.* The commission has found no evidence that the United States monitored the recipient countries' compliance with these responsibilities.

Plunder and Restitution: The U.S. and Holocaust Victims Assets: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report 8 (2000) (emphasis added). A critical component of external restitution was that property was sent to the country of origin, which then *had the responsibility to restitute it to the rightful owner.*

Nothing about the external restitution policy suggests that the rightful owner of an artwork is precluded from bringing an action to recover her artwork merely because it was externally restituted. Indeed, the failure of countries of origin to return items to their rightful owners subsequent to external restitution is one of the situations that the Washington

Principles was intended to cover. *See* Stuart E. Eizenstat, *Imperfect Justice* 188-189 (2003).

Our courts have rejected the argument that the country of origin's post-War restitution laws could be viewed as the exclusive means of restoring property. This was made clear by former Chief Judge (later Attorney General) Michael B. Mukasey in *U.S. v. Portrait of Wally*, No. 99 Civ. 9940, 2002 WL 553532, at *8 (S.D.N.Y. Apr. 12, 2002) ("That Austria, pursuant to Treaty, sought to return all improperly seized property or to otherwise use it for the victims' general benefit does not deprive this court of jurisdiction over property that escaped such disposition."). *See also Republic of Austria v. Altmann*, 541 U.S. 677 (2004). So too, our courts can adjudicate cases dealing with property that escaped restitution to the original owners following its return to the Netherlands by U.S. troops.

IV. The Stroganoff Red-Herring

Through disingenuous wording and an incorrect recital of the allegations in Petitioner's complaint, Respondents imply that this case is ultimately about choosing between the heirs of two families who both previously lost the Cranachs through looting and who both sought restitution. Besides being irrelevant to the issue decided by the Ninth Circuit as to which certiorari is sought, this is entirely false. Respondents first state that "the Soviet Union seized the Cranachs from a church in the 1920s," citing paragraph 11 of the complaint (Resp. 11), suggesting an unstated parallel with the Nazi practice of looting artworks. Nowhere, however, does the complaint allege that the Cranachs were "seized"

by the Soviet Union. It states only that the Cranachs were transferred from the church to state-owned museums. ER 279. The Soviet nationalization of property, such as the Cranachs, has long been recognized as valid by U.S. courts. *See Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 22 (S.D.N.Y. 1976). Respondents completely fail to mention that the complaint goes on to allege that the Soviet Government made arrangements to sell *state-owned artworks* abroad and that these works, which included the Cranachs, came from various state-owned museums as well as the Stroganoff Collection. ER 279. Building on that omission, Respondents then cite paragraph 13 of the complaint to state that the Cranachs were sold in Germany in 1931 "in an auction that was titled simply 'the Stroganoff Collection'" and that Jacques purchased them there, but omit the most critical sentence from that paragraph: "Some of the artworks, like the Cranachs, were not at that time, and had never been, part of the Stroganoff Collection." ER 279.

This is actually underscored by Respondents' own citation to *Stroganoff-Scherbatoff*, 420 F. Supp. at 20. Resp. 7. The claimant in that case, who was seeking recovery of artworks he alleged were part of the Stroganoff Collection, was the same individual from whom Respondents acquired the Cranachs. Respondents presumably include the citation because the 1931 auction of the Stroganoff Collection is mentioned. The very page of that decision to which Respondents cite, however, shows that the issues in that case precisely parallel Petitioner's allegations about the source of the Cranachs: "Defendant Weldon contends that the auction catalogue does not support plaintiff's

contentions that the . . . [claimed artwork] was part of the Stroganoff Collection. Rather, Weldon contends that . . . [it] was part of the collection of the Imperial Hermitage Museum in St. Petersburg, Russia." *Id.* The court ultimately ruled against Stroganoff-Scherbatoff, and courts in other countries had rejected similar claims by Russian émigrés even before the 1931 auction took place. *Id.* at 21-22.

V. Respondents' Misreading of the Ninth Circuit's Opinion

Respondents argue that the Ninth Circuit would have found that §354.3 did not address a traditional state interest, even if applied only to museums and galleries in California. Resp. 19. But this contention is belied by the plain language of the opinion. The Ninth Circuit stated that California has a legitimate state interest in regulating museums and galleries within its borders (App. 23a), but

> [b]y opening its doors as a forum to all Holocaust victims and their heirs to bring Holocaust claims in California against "any museum or gallery" whether located in the state or not, California has expressed its dissatisfaction with the federal government's resolution.... In so doing, California can make "no serious claim to be addressing a traditional state responsibility."

App. 24a. As Judge Pregerson explained in his dissent, it was the opening of the state's doors to claims against non-residents that the Ninth Circuit found eviscerated

California's traditional state interest. It is highly unlikely that Judge Pregerson misapprehended or misread the majority opinion.

VI. "Attacks" Against Foreign Sovereigns

Finally, Respondents raise the argument that §354.3 will allow U.S. courts to collaterally attack restitution decisions made by foreign governments, noting that in the instant case it is alleged that the Dutch Government wrongfully sold the Cranachs to Stroganoff. Nevertheless, even if Petitioner only continues to prosecute her case under California's general statute of limitations, which the Ninth Circuit concluded is permissible (App. 35a), a court in California will still have to review the Dutch Government's treatment of the Cranachs. Thus, it was not §354.3 that requires or even allows the courts to review prior acts of a foreign government. It has long been U.S. policy that victims of Nazi forced transfers may bring lawsuits in U.S. Courts to recover their property. *See Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

CONCLUSION

For all of the foregoing reasons, and as set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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No. 09-1254

In the Supreme Court of the United States

MAREI VON SAHER, PETITIONER

v.

NORTON SIMON MUSEUM OF ART AT PASADENA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals correctly held that federal law preempts a California state statute that creates a cause of action for the recovery of Nazi-confiscated artwork, with an extended statute of limitations for any such action to December 31, 2010.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Petitioner brought this action to recover two paintings by Lucas Cranach the Elder (the Cranachs). Those paintings were purchased around 1971 by the Norton Simon Art Foundation, and they are currently on display in the Norton Simon Museum of Art at Pasadena (Norton Simon). Because the Cranachs' post-war history and the previous efforts by petitioner and her predecessor to recover them matter to this case, the government recounts that background in some detail.

a. *The United States' external restitution.* Petitioner is the sole heir of Jacques Goudstikker, a Dutch art dealer who purchased the paintings from the Soviet Union in 1931. Goudstikker and his family fled the Netherlands in 1940, following the Nazi invasion. Subsequently, all of Goudstikker's assets were forcibly sold in two transactions: Alois Miedl, a German banker living in the Netherlands, acquired Goudstikker's art dealership and certain real and personal property for 550,000 guilders (or about $4.5 million today); and Hermann Göring, Reichsmarschall of the Third Reich, acquired the bulk of Goudstikker's art collection, which contained over 1,000 artworks and included the Cranachs, for 2 million guilders (or about $16.5 million today). In May 1945, the Cranachs and Goudstikker's other paintings were recovered by the United States Army. In 1946, the United States returned all of the paintings to the Dutch government, pursuant to a policy of "external restitution." Under that policy, the United States returned property taken by the Nazis and recovered by Allied forces, including artworks like the Cranachs, to their countries of origin rather than directly to particular claimed owners. Pet. App. 5a, 8a-10a; see C.A. E.R. 45.

The policy of external restitution was an outgrowth of the London Declaration of January 5, 1943, in which the Allied nations—including the United States and the Netherlands—reserved the right to invalidate wartime transfers of property. In November 1943, the State Department established an Interdivisional Committee on Reparations, Restitution, and Property Rights, which determined that property taken by the Nazis should be turned over to its country of origin, with the expectation that the country of origin would return the property to its lawful owners. The Committee foresaw that once the

external restitution had been made, the United States would play no further role in disposition of the property. On July 29, 1945, President Truman approved that policy at the Potsdam Conference, and thereafter American occupying forces implemented the policy under the order of General Eisenhower. The United States set a three-year deadline for filing claims, and it declined to accept any claims for external restitution after September 15, 1948. Pet. App. 15a-18a.

b. *The Netherlands' internal restitution.* In 1946, Goudstikker's widow returned to the Netherlands and began attempting to recover her family's property. Under Dutch law, claimants were given until July 1, 1951, to file a restitution petition, and claimants who had received money in forced sales generally were required to turn over those proceeds to the Dutch government as a condition of receiving their property. C.A. E.R. 23, 48. After negotiating with the Dutch government for several years, Ms. Goudstikker filed a timely petition in 1951 and subsequently entered into a settlement agreement on August 1, 1952. *Id.* at 47-48. Under that agreement, Ms. Goudstikker received most of the real and personal property acquired by Miedl in exchange for returning a portion of the money paid by Miedl and relinquishing claims to the remaining property transferred in the Miedl transaction. *Id.* at 48, 52-53. The agreement did not, however, encompass the artworks acquired by Göring, and the Dutch-imposed deadline for filing restitution claims lapsed. *Id.* at 48-49; see C.A. Supp. E.R. 151-152.

In 1961, George Stroganoff-Scherbatoff (Stroganoff), heir to the Stroganoff family, instituted a restitution proceeding in the Netherlands for the Cranachs and other paintings. C.A. E.R. 282. Stroganoff asserted

that the paintings had been seized from his family by the Soviet Union and unlawfully auctioned to Goudstikker. *Id.* at 279, 282. In July 1966, the Dutch government transferred the Cranachs and another painting to Stroganoff in settlement of his claim and in exchange for a monetary payment. *Id.* at 282. Around 1971, Stroganoff sold the Cranachs to the Norton Simon Art Foundation. *Id.* at 283.

c. *Petitioner's 1998 restitution proceeding.* In 1996, after Ms. Goudstikker and her son had died, petitioner (her daughter-in-law) was left as the sole heir. C.A. E.R. 283. In 1998, petitioner filed a claim with the Dutch State Secretary for Education, Culture, and Science, in which petitioner requested two things: "all properties that Hermann Göring obtained from [Goudstikker] and over which the State has gained control," and the "sales prices" for any such property sold by the State. C.A. Supp. E.R. 147-148. Petitioner's claim thus included the Cranachs, which had been sold to Stroganoff in 1966 in settlement of his claim. C.A. E.R. 282. The State Secretary rejected petitioner's claim as barred by the Dutch statute of limitations on restitution claims, which he declined to waive, finding that "directly after the war—even under present standards—the restoration of rights was conducted carefully." C.A. Supp. E.R. 147.

Petitioner sought review of that decision in the Court of Appeals for the Hague, which likewise declined to grant relief. See C.A. Supp. E.R. 145-153.[1] The court

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[1] Petitioner contends that the Court of Appeals decided the case only on procedural and jurisdictional grounds. That does not appear to be correct. The court did hold that it could not decide petitioner's claim as an appeal from the State Secretary's decision (because the State Secretary was not a judicial division), see C.A. Supp. E.R. 148-150, or as a

"[took] into consideration that nearly 50 years have now elapsed since the last moment that an application for the restoration of rights could be submitted." *Id.* at 150. In addition, the court concluded, Ms. Goudstikker "made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction." *Id.* at 151. The court rejected petitioner's argument that Ms. Goudstikker's failure to seek restoration of rights should be excused because she had been misled by Dutch authorities about the nature of the Göring transaction and the value of the paintings. The court pointed out that Ms. Goudstikker had "expert legal advisors" who could have argued that the transaction was involuntary and that she could have requested her own expert appraisal. *Id.* at 152. Finally, the court found that the original restitution proceedings did not violate international law, because "[t]he Netherlands created an adequately guaranteed procedure for handling applications for the restoration of rights." *Ibid.*

d. *The United States' modern policy.* A number of problems emerged with post-war restitution policy,[2] and as a result, impetus developed for a more equitable approach to recovery of Nazi-looted art. In response, the

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direct restitution proceeding (because the claim was filed after July 1, 1951, and was thus time-barred), see *id.* at 151. The court then further held, however, that it would not exercise its power "to grant ex officio restoration of rights." *Id.* at 152. In that portion of its opinion, the court made clear that it could grant petitioner relief, *id.* at 151, although it declined to do so on the ground that Ms. Goudstikker had voluntarily forgone the claim in the early 1950s. See *id.* at 151-152; see also C.A. E.R. 61.

[2] See Presidential Advisory Comm'n on Holocaust Assets in the U.S., *Plunder and Restitution: The U.S. and Holocaust Victims' Assets* at SR-140 (2000) (*PCHA Report*).

United States convened a Conference on Holocaust-Era Assets in Washington in 1998. At that Conference, representatives of 13 nongovernmental organizations and 44 governments, including the United States and the Netherlands, reached consensus on the Washington Conference Principles on Nazi-Confiscated Art (Washington Principles). That set of 11 "non-binding principles" is designed "to assist in resolving issues relating to Nazi-confiscated art," "recogniz[ing] that among participating nations there are differing legal systems and that countries act within the context of their own laws." *Washington Conference Principles on Nazi-Confiscated Art* (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/122038.htm. In general, the Washington Principles encourage national efforts to identify art taken by the Nazis and not subsequently restituted, to publicize the existence of such art, and to restitute it to its pre-war owners.

In June 2009, representatives of 46 governments, including the United States and the Netherlands, reaffirmed the Washington Principles in the Terezin Declaration. That "legally non-binding" Declaration "urge[d] all stakeholders to ensure that their legal systems or alternative processes * * * facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims." *Prague Holocaust Era Assets Conference: Terezin Declaration* (June 30, 2009), http://www.state.gov/p/eur/rls/or/126162.htm. Thus, as more fully elaborated below, see p. 18, *infra*, contemporary U.S. policy supports the fair and just resolution of claims involving Nazi-confiscated art, while also respecting the

bona fide internal restitution proceedings of foreign governments.

e. *Petitioner's 2004 restitution proceeding.* From 2000 to 2001, in part in response to the Washington Principles, the Dutch government "decided to depart from a purely legal approach [to] the restitution of 'war art' and to choose a more moral policy approach," and on that basis it adopted an extended restitution policy. C.A. E.R. 60. In 2004, petitioner filed an application for the return of all artworks formerly owned by Goudstikker that were then in the Dutch government's possession. See *id.* at 41. After referring the matter to the Restitutions Committee, the State Secretary determined that petitioner's application involved "a matter of restoration of rights which has been settled," because "[i]n 1999 the Hague Court of Appeal * * * gave a final decision in this case." *Id.* at 62. For that reason, the State Secretary explained, "this case is not included in the [Dutch government's] current restitution policy." *Ibid.*

The State Secretary nevertheless decided "that in this special case there are grounds that justify a restitution" of artworks still in the Dutch government's possession, based on "the facts and circumstances surrounding the involuntary loss of property and the manner in which the matter was dealt with in the early Fifties." C.A. E.R. 62. The State Secretary therefore ordered the transfer to petitioner of more than 200 artworks. The State Secretary did not require petitioner to repay any portion of the two million guilders received from Göring. *Id.* at 62-63. And the State Secretary did not address paintings, like the Cranachs, that were no longer in the government's possession.

2. In 2002, California enacted Section 354.3 of its Code of Civil Procedure, which provides:

> Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity.

Cal. Civ. Proc. Code § 354.3(b) (West 2006). The statute defines an "[e]ntity" as "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance." *Id.* § 354.3(a)(1). It defines "Holocaust-era artwork" as "any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945." *Id.* § 354.3(a)(2). Finally, the statute provides that "[a]ny action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010." *Id.* § 354.3(c).

3. In 2007, petitioner, a resident of Connecticut, brought this action in federal district court in California, seeking recovery of the Cranachs from Norton Simon. See C.A. E.R. 276-288.

a. The district court granted Norton Simon's motion to dismiss. Pet. App. 75a-83a. The court held that "by enacting Section 354.3, 'California seeks to redress wrongs committed in the course of the Second World War'—a legislative act which 'intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims.'" *Id.* at 81a (quoting *Deutsch* v. *Turner Corp.*, 324 F.3d 692, 712 (9th Cir.), cert. denied, 540 U.S. 820, and 540 U.S. 821 (2003)). The court further held that in the absence of Section 354.3's extended statute of limitations, peti-

tioner's claim was untimely under California's general three-year statute of limitations governing "actions for the specific recovery of personal property." *Id.* at 82a (quoting Cal. Civ. Proc. Code § 338(c) (West 2006)).

b. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-38a. The court concluded that Section 354.3 does not conflict with "the federal government's policy of external restitution," because that policy "ended in 1948" and "Section 354.3 cannot conflict with or stand as an obstacle to a policy that is no longer in effect." *Id.* at 18a-19a. The court held, however, that Section 354.3 is preempted because "the power to legislate restitution and reparation claims[] is one that has been exclusively reserved to the national government by the Constitution." *Id.* at 28a. The court further held that petitioner's claim might be timely under the statute of limitations for actions seeking recovery of personal property, and it remanded to determine when petitioner "discovered or reasonably could have discovered her claim to the Cranachs." *Id.* at 33a.

Judge Pregerson dissented in part, concluding that Section 354.3 is not preempted by the federal government's foreign affairs powers. Pet. App. 36a-38a.

DISCUSSION

The court of appeals correctly held that the invocation in this case of California Code of Civil Procedure § 354.3, which creates a cause of action with an extended statute of limitations for recovery of Nazi-confiscated art wherever it is located, impermissibly intrudes upon the foreign affairs authorities of the federal government. Review of that decision is not warranted, especially at this interlocutory stage of the case. No other court of appeals has addressed whether a State may create a

cause of action with an extended statute of limitations specifically for the recovery of Nazi-confiscated art. Section 354.3's limitations period expired on December 31, 2010, and the parties identify only one other pending case brought under Section 354.3. And the decision below may not matter even in this case, because the case was remanded to determine whether petitioner's claim is timely under another statute of limitations. If petitioner does not prevail on remand, she may seek this Court's review after a final judgment.

A. Application Of Section 354.3 In This Case Intrudes Upon Substantial Foreign Policy Authorities Of The United States

This case does not involve the application of a state statute or common law of general applicability that addresses matters of traditional state interest and only incidentally touches on foreign affairs prerogatives of the United States Government. Rather, this case involves a state statute that is specifically and purposefully directed at claims arising out of transactions and events that occurred in Europe during the Nazi era, that in many cases were addressed in the post-War period by the United States and European Governments, and that in this case have been further addressed by the Netherlands in restitution proceedings in recent years. In these circumstances, petitioner cannot now rely on Section 354.3 in an effort to recover the Cranachs.

1. a. The court of appeals rejected petitioner's argument that Section 354.3 concerns a "traditional state responsibility," Pet. App. 20a (quoting *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 419 n.11 (2003)) —namely, "the establishment of a statute of limitations for actions seeking the return of stolen property," *id.* at

21a. As the court explained, "[Section] 354.3 cannot be fairly characterized as a garden variety property regulation. Section 354.3 does not apply to all claims of stolen art, or even all claims of art looted in war. The statute addresses only the claims of Holocaust victims and their heirs." *Ibid.* Thus, the court observed, although Section 354.3 "purports to regulate property, an area traditionally left to the [S]tates," its "real purpose is to provide relief to Holocaust victims and their heirs." *Id.* at 21a-22a.

The court of appeals emphasized in this regard that Section 354.3 is not limited to regulating museums and galleries in California. Pet. App. 23a. As petitioner acknowledges (Pet. 17-19), that geographic limitation was eliminated from the provision prior to enactment for the specific purpose of extending its reach to any museum over which California courts could obtain jurisdiction, regardless of whether the artwork at issue had entered California. Pet. App. 23a. Indeed, in what is apparently the only other pending case under Section 354.3, the museum and artwork are both located in Spain. See p. 21, *infra*. Nor is Section 354.3 limited to suits brought by California residents. In fact, petitioner is a resident of Connecticut. See C.A. E.R. 277.

The court of appeals therefore reasonably determined that Section 354.3's broad scope "belies California's purported interest in protecting its residents and regulating its art trade," and instead "suggests that California's real purpose was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the [S]tate." Pet. App. 23a. That, the court explained, "is not an area of 'traditional state responsibility.'" *Id.* at 25a. The court of appeals then concluded

that, in thus moving beyond its traditional responsibilities and enacting a measure specifically directed at claims arising out of transactions and events in Europe during the Nazi era—by providing its own means of "restitution for injuries inflicted by the Nazi regime," *id.* at 28a—California had impermissibly intruded on the United States' foreign affairs prerogatives. *Id.* at 25a-30a.

b. As this Court has emphasized, "[i]n international relations * * * the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd.* v. *County of L.A.*, 441 U.S. 434, 448 (1979) (citation omitted). It necessarily follows that "[p]ower over external affairs is not shared by the States," but instead "is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942); see *Garamendi*, 539 U.S. at 413; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

The federal government has traditionally exercised its foreign relations and war powers with respect to the resolution of private parties' claims arising out of international disputes. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 679 (1981) ("[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries."); *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring) ("That the President's control of foreign relations includes the settlement of claims is indisputable."); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796); *Deutsch* v. *Turner Corp.*, 324 F.3d 692, 712-714 (9th Cir.) ("[T]he Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims,

is central to the foreign affairs power in the constitutional design."), cert. denied, 540 U.S. 820, and 540 U.S. 821 (2003).

There accordingly is considerable force to the court of appeals' view that, by targeting the claims of Holocaust survivors and their heirs to Nazi-confiscated art, rather than merely applying to such claims a law of general applicability, California has impermissibly intruded upon foreign affairs prerogatives of the federal government. The President and Congress have the sole authority to resolve (or to establish mechanisms to resolve) the claims of U.S. nationals when their claims are singled out precisely because they arise out of such international incidents. See, *e.g.*, *Dames & Moore*, 453 U.S. at 679. The same would seem to be true of singling out for resolution the claims of foreign nationals (or the heirs of foreign nationals) because they arise out of international incidents.

2. There is no occasion in this case, however, to consider the preemptive force of the foregoing general principles standing alone, because petitioner's present suit under Section 354.3 raises particular inconsistencies with implementation of restitution policies to which the United States has adhered.

a. In *Garamendi*, this Court considered California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800-13807 (West 2005), which required any insurer doing business in the State to disclose certain information about Holocaust-era insurance policies. See 539 U.S. at 401. The Court regarded as beyond dispute that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy," in light of the Constitution's allocation of the foreign relations power to the

United States rather than the several States. *Id.* at 413. The Court further observed that, "[h]istorically, wartime claims against even nominally private entities have become issues in international diplomacy," because "diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments." *Id.* at 416.

In recognition of the various contexts in which issues concerning preemption of state laws affecting foreign affairs may arise, the Court questioned whether it is necessary to make "a categorical choice between the contrasting theories of field and conflict preemption." *Garamendi*, 539 U.S. at 419. Rather, the Court suggested that those theories "can be seen as complementary," depending on whether a State has acted within an area of traditional responsibility. *Id.* at 419 n.11. "If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," the Court indicated, "field preemption might be the appropriate doctrine." *Ibid.* But if a State has acted in an area of traditional responsibility in a way that affects foreign relations, "it might make good sense to require a conflict, of a clarity or substantiality that would vary" with the strength and nature of the asserted state interest and possibly also the federal interest. *Ibid.*

The Court did not, however, decide any question of field preemption, because it found "a sufficiently clear conflict" between HVIRA and "express foreign policy of the National Government." *Garamendi*, 539 U.S. at 420. The Court recognized that "[t]he issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and execu-

tive agreements over the last half century, and * * * securing private interests is an express object of diplomacy today." *Id.* at 420-421. After surveying how that federal foreign policy has treated disclosure by insurers, the Court determined that "California has taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail." *Id.* at 423. The Court concluded that even "[i]f any doubt about the clarity of the conflict remained, * * * it would have to be resolved in the National Government's favor, given the weakness of the State's interest * * * in regulating disclosure of European Holocaust-era insurance policies." *Id.* at 425.

b. Somewhat similar considerations are present here. Unlike in *Garamendi*, the United States has not entered into Executive Agreements with foreign governments to resolve contemporary claims for Holocaust art, and it has supported the just and equitable resolution of claims from that era. But as the court of appeals noted, like HVIRA in *Garamendi*, Section 354.3 is not a statute of general applicability directed to matters of traditional state interest. Pet. App. 21a-25a. Although petitioner asserts (Pet. 19) that Section 354.3 is directed to a state interest in regulating entities that currently avail themselves of the privilege of transacting business in California, the provision in fact is expressly targeted at claims to artworks that were seized prior to and during World War II (including, as here, artworks that later were the subject of restitution proceedings by European governments). In *Garamendi*, the Court rejected California's similar effort to justify HVIRA as a regulation of the current business activities of insurers in the State, explaining that "quite unlike a generally applicable 'blue

sky' law, HVIRA effectively singles out only policies issued by European companies, in Europe, to European residents, at least 55 years ago." 539 U.S. at 425-426. Accordingly, Section 354.3 is reasonably viewed as an effort by California to "create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the [S]tate." Pet. App. 23a. And by providing "a new cause of action," *Garamendi*, 539 U.S. at 423, with an extended statute of limitations for claimants of Holocaust-era artwork, California has, as in *Garamendi*, "expressed its dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of World War II." Pet. App. 24a.

Notably, moreover, this case concerns artworks and transactions that, consistent with U.S. policies, have already been the subject of both external and internal restitution proceedings, including recent proceedings by the Netherlands in response to the Washington Principles. This case does not involve artwork whose existence or provenance has only recently been discovered and has never been the subject of restitution proceedings. The Cranachs were transferred by the United States to the Netherlands in 1946 pursuant to the policy of external restitution. Pet. App. 5a, 9a-10a; see C.A. E.R. 45. One of the purposes of that policy at the time was to prevent the United States from becoming entangled in difficult ownership questions regarding confiscated property. See *PCHA Report* at SR-140. That policy judgment demonstrates that, from the perspective of the United States, it was the particular nation concerned (here, the Netherlands) that was to have the immediate responsibility for determining issues of ownership and

restitution of, or restoration of rights in, works like the Cranachs.

The court of appeals erred in dismissing the external restitution policy as irrelevant to this case because it "ended" on September 15, 1948—the deadline set by the United States for filing restitution claims. Pet. App. 18a. The United States established a deadline to ensure prompt submission of claims and achieve finality in the wartime restitution process. The United States has a continuing interest in that finality when appropriate actions have been taken by a foreign government concerning the internal restitution of art that was externally restituted to it by the United States following World War II.[3]

In this case, Ms. Goudstikker settled with the Dutch government in 1952, and that settlement did not provide for the return of artworks like the Cranachs that had been acquired by Göring. C.A. E.R. 47-49. When petitioner brought a Dutch restitution proceeding in 1998, the State Secretary found that "directly after the war—even under present standards—the restoration of rights was conducted carefully." C.A. Supp. E.R. 147. Petitioner sought review of that decision in the Court of Appeals for the Hague, which found that at the time of the 1952 settlement Ms. Goudstikker "made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction." *Id.* at 151.

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[3] The United States does not contend that the fact that the Cranachs were returned to the Dutch government pursuant to the external restitution policy would be sufficient of its own force to bar litigation if, for example, the Cranachs had not been subject (or potentially subject) to bona fide internal restitution proceedings in the Netherlands.

Petitioner correctly observes (Pet. 24-25) that there are other relevant aspects of federal policy regarding Nazi-confiscated art that the court of appeals did not discuss. In 1998 and 2009, respectively, the United States endorsed the Washington Principles and the Terezin Declaration. See p. 6, *supra*; Pet. App. 29a. The Washington Principles generally encourage the return to its pre-war owner of art that was confiscated by the Nazis and not subsequently restituted or available to be restituted through bona fide proceedings. And the Terezin Declaration encourages those restitution proceedings to be conducted expeditiously, based on the facts and merits of the Holocaust victims' claims.

Petitioner is thus correct that it is United States policy to support both the just and fair resolution of claims to Nazi-confiscated art on the merits and the return of such art to its rightful owner. But that policy does not support relitigation of all art claims in U.S. courts. Neither the Washington Principles nor the Terezin Declaration takes an explicit position in favor of or against the litigation of claims to Nazi-confiscated art. Rather, they encourage resort to alternative dispute resolution, so that such claims may be resolved as justly, fairly, and expeditiously as possible.

The recent expanded restitution policy in the Netherlands is an example of a non-adversarial mechanism developed by a foreign nation in light of the Washington Principles. The Dutch government "decided to depart from a purely legal approach [to] the restitution of 'war art' and to choose a more moral policy approach." C.A. E.R. 60. But even under that approach, the Dutch government has not provided for damages claims for artwork that it previously sold or transferred to third parties. See Advisory Comm. on the Assessment of Restitu-

tion Applications for Items of Cultural Value and the Second World War, *Report 2009*, at 71 (May 2010), http://www.restitutiecommissie.nl/images/stories/files/report2009-met%20wijz.b6.pdf (providing for restitution only of items in the Dutch government's possession). Nor does the Dutch government otherwise review claims for artwork that is in private possession, unless both the claimant and the current possessor submit a joint request to the State Secretary. See *ibid.*

In 2004, petitioner brought another restitution proceeding in the Netherlands, and the State Secretary determined that the case was "not included in the [Dutch government's] current restitution policy" because it involved a "matter of restoration of rights which has been settled" and "[i]n 1999 the Hague Court of Appeal * * * gave a final decision in the case." C.A. E.R. 62. The State Secretary nonetheless decided "that in this special case there [were] grounds that justif[ied] a restitution," based on "the facts and circumstances surrounding the involuntary loss of property and the manner in which the matter was dealt with in the early Fifties." *Ibid.* The State Secretary therefore ordered the return to petitioner of more than 200 artworks in the Dutch government's possession.

As both the 1998 and 2004 restitution proceedings reflect, the Dutch government has afforded petitioner and her predecessor adequate opportunity to press their claims, both after the War and more recently. When a foreign nation, like the Netherlands here, has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, the United States has a substantial interest in respecting the outcome of that nation's proceedings.

c. The act of state doctrine and considerations of international comity, although not directly applicable at this stage of the proceedings, also weigh in favor of giving effect to the Dutch government's actions in this case. See, *e.g.*, *Diorinou* v. *Mezitis*, 237 F.3d 133, 140-141 (2d Cir. 2001); 1 Restatement (Third) of Foreign Relations Law of the United States, §§ 481-482 (1987) (providing for recognition in certain circumstances of foreign judgments denying recovery of monetary sums). Recognition of the actions of the Dutch government is a defense distinct from preemption, cf. *id.* § 481, comment b, but the existence of a defense based on such actions shows that petitioner's suit under Section 354.3 implicates substantial foreign affairs interests of the United States.

B. Review By This Court Is Not Warranted At This Time

The court of appeals' decision does not warrant review at this time for four reasons. *First*, no other court of appeals has addressed whether a State may create a cause of action (with its own extended statute of limitations) for the recovery of Nazi-confiscated art, including art that has been the subject of bona fide internal restitution proceedings. Petitioner does not contend otherwise. Petitioner does argue (Pet. 9-16) that the court of appeals' decision conflicts with *Garamendi*'s analysis of field preemption. But as explained above, this case does not present a suitable occasion for addressing that broad question in light of the inconsistencies between this suit under Section 354.3 and the implementation of restitution policies to which the United States has adhered.[4]

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[4] Petitioner argues in a supplemental brief that the court of appeals' decision in *Mousesian* v. *Victoria Versicherung AG*, 629 F.3d 901 (9th Cir. 2010), supports review by this Court. *Mousesian* concerned Cal. Civ. Proc. Code § 354.4 (West 2006), which creates a cause of action

Second, the question whether Section 354.3 is preempted is not of any continuing importance. Section 354.3's extended statute of limitations expired on December 31, 2010, and the parties identify only one other pending case brought under Section 354.3, *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc), petition for cert. pending, No. 10-786 (filed Dec. 10, 2010). In *Cassirer*, neither the Kingdom of Spain nor the Thyssen-Bornemisza Collection Foundation thus far has raised a preemption defense. See *id.* at 1022.[6]

Third, the court of appeals' preemption holding may not be decisive even in this very case, because that court

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and extends the statute of limitations for California residents with insurance claims arising out of the "Armenian Genocide." *Ibid.* The court of appeals initially found Section 354.4 invalid as a matter of conflict preemption, see *Movsesian* v. *Victoria Versicherung AG*, 578 F.3d 1052, 1059 (9th Cir. 2009), but on rehearing the panel reversed course and held that there is no clear federal policy with respect to recognition of that event in Armenian history, see 629 F.3d at 907. Regardless of whether there is a federal policy in that context, here the artworks that are the subject of petitioner's claim have already been subject to both external and internal restitution proceedings, consistent with United States policy. But to the extent there is any intracircuit disagreement between the decision below and *Movsesian*, that issue does not merit this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Both the decision below and *Movsesian* are interlocutory, and the en banc court of appeals can resolve any tension between those decisions.

[6] The petitioners in *Cassirer* have asserted sovereign immunity, but the Ninth Circuit allowed the action to proceed under the "expropriation" exception in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1605(a)(3). 616 F.3d at 1022. Thus, if this Court were to grant certiorari in *Cassirer*, it would not affect the decision below. On March 21, 2011, the Court invited the Acting Solicitor General to file a brief as amicus curiae expressing the views of the United States in *Cassirer*.

remanded to determine whether petitioner's claim is timely under another California statute of limitations for actions to recover personal property. Pet. App. 34a-35a. It is thus possible that on remand petitioner's action will be deemed timely. Two courts of appeals have held that application of general state statutes of limitations to claims seeking recovery of Holocaust-era artwork does not impermissibly intrude upon federal foreign affairs authorities. See *Museum of Fine Arts* v. *Seger-Thomschitz*, 623 F.3d 1, 12-13 (1st Cir. 2010), cert. denied, 131 S. Ct. 1612 (2011); *Dunbar* v. *Seger-Thomschitz*, 615 F.3d 574, 578-579 (5th Cir. 2010), cert. denied, 131 S. Ct. 1511 (2011).

Fourth and finally, the interlocutory posture of this case "alone furnishe[s] sufficient ground for the denial" of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). Even if issues concerning the preemption of Section 354.3 might otherwise warrant review at some point, the Court, in the interest of judicial economy, should postpone any review until after the conclusion of the proceedings on remand, thereby permitting the Court to consider all of petitioner's contentions, including any that might arise on remand, in a single petition. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001). Review by this Court would be premature at this juncture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA, NORTON SIMON ART FOUNDATION, and THE NORTON SIMON FOUNDATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* BET TZEDEK LEGAL SERVICES, SIMON WIESENTHAL CENTER, AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS AND THE JEWISH FEDERATION COUNCIL OF GREATER LOS ANGELES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Bet Tzedek Legal Services ("Bet Tzedek"), the Simon Wiesenthal Center, the American Jewish Committee, the American Jewish Congress, and the Jewish Federation Council of Greater Los Angeles ("Jewish Federation") (collectively "*Amici*") submit this Brief as *amici curiae* in support of Petitioner Marei Von Saher's Petition for Writ of Certiorari.[1]

INTEREST OF *AMICI CURIAE*

Bet Tzedek, "The House of Justice," is a non-profit legal services agency that, since 1974, has been providing free legal representation to thousands of low-income residents throughout Southern California. It is one of the only organizations in the United States regularly representing Holocaust survivors, having represented more than 800 such clients in their efforts to assert claims under various reparations programs, United States-based litigation, and other humanitarian relief programs administered by various international funds or governments.

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amici's intention to file this brief; all counsel have consented to the filing of this brief and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

The Simon Wiesenthal Center is an advocacy organization that has particular expertise in the prosecution of Nazi War criminals and is dedicated to the vindication of the rights of Holocaust survivors. Through counsel, it is a signatory to an agreement that resolved a major piece of Holocaust litigation in the 1990's. In addition, the Simon Wiesenthal Center has sponsored a conference on property and art restitution.

The American Jewish Committee ("AJC") is an international human relations organization, founded in 1906 to protect the civil and religious rights of Jews, and to combat anti-Semitism and other bigotry. It maintains regional offices in major cities nationwide, as well as eight overseas. AJC has a long history of active involvement with restitution and indemnity claims on behalf of Holocaust survivors. It has played an integral role in advocating for restitution and the return of assets to Holocaust survivors and their heirs.

The American Jewish Congress is an organization founded in 1918 to protect the civil, religious, political and economic rights of American Jews. Since the early 1950's, the American Jewish Congress has participated in many lawsuits seeking restitution of property stolen from Jews by the Nazis.

The Jewish Federation is the central organizing, planning and fundraising organization for the Los Angeles Jewish Community. The Jewish Federation

identifies and funds social service, educational and humanitarian needs locally, in Israel and around the world. Providing for the needs of Holocaust survivors and their families has long been a core priority of the Jewish Federation.

Amici bring a unique point of view to this case and are qualified to assist this Court in its decision. Through their work with Holocaust victims and their heirs, *Amici* have witnessed the tremendous difficulties involved in identifying, locating and recovering property that was seized, stolen or confiscated during World War II. The problems are further compounded by the assertion of numerous purported legal barriers to the recovery of the property.

California has specifically recognized the state interest in alleviating the hardship faced by Holocaust victims and their heirs in recovering artwork taken from the victims. It has done so in part by enacting California Code of Civil Procedure section 354.3, a statute that simply affords victims and their heirs the opportunity to pursue the recovery of their artwork from museums and galleries until 2010, rather than binding them to general statutes of limitations that, in many cases and through no fault of the victims, may have expired years or decades ago. *Amici* strongly believe that statutes such as section 354.3 promote important state interests and are not preempted by the federal government's foreign affairs power.

ARGUMENT

I. INTRODUCTION

This Court recognized in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) ("*Garamendi*") that, properly understood, preemption of state laws based on the federal government's foreign affairs power occurs only in two limited circumstances: (1) where the state law conflicts with a treaty, federal statute, executive agreement, or express federal policy, or (2) in those rare instances where even though the federal government has not acted, a state statute criticizes, or fosters criticism of, a foreign government. Cases decided both before and after *Garamendi* have also carefully confined foreign affairs preemption to one of these two circumstances. And for good reason, since the scope of the federal government's foreign affairs power is not clearly defined in the Constitution and, unless properly tethered, could usurp many laws and regulations traditionally within the states' competence.

The Ninth Circuit's decision in *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010) ("*Von Saher*") invalidated a state statute of limitations for certain property claims despite the absence of any conflict with federal law or policy and notwithstanding the lack of any state criticism of a foreign government. Instead, the panel majority crafted a new and expanded dormant foreign affairs preemption power that has never been recognized by this or any other Court.

This unwarranted extension of foreign affairs preemption far beyond the carefully delineated boundaries established by this Court reflects a fundamental misunderstanding of this Court's foreign affairs jurisprudence. Unless reversed, *Von Saher* threatens to upset the previously existing balance between federal and state law and to legitimize broadside dormant "foreign affairs" attacks on state law never before permitted. Given the increased globalization of modern society and ordinary business affairs, there is a significant risk that *Von Saher*-styled foreign affairs preemption could be used as a pretext to challenge a variety of otherwise unobjectionable state laws.

To preserve the narrow framework for foreign affairs preemption adopted by this Court and followed by all other courts except the Ninth Circuit panel in *Von Saher*, this Court should grant certiorari. Since the Ninth Circuit found no conflict between the state statute and federal law or policy, this Court should then reverse the Ninth Circuit decision and order the case remanded to the District Court for further proceedings on the merits of Petitioner's claims.

II. THE FOREIGN AFFAIRS POWER HAS BEEN CONSISTENTLY APPLIED AND USED SPARINGLY TO PREEMPT STATE LAW

This Court and others have described the federal government's foreign affairs power in broad terms. Nevertheless, a review of the leading cases decided by

this Court reflects a constrained and consistent view of when that federal power ought to preempt state law or other state conduct. More specifically, in virtually all the decisions of this Court implicating foreign affairs, the federal government has affirmatively acted, and the courts have employed a conflict preemption analysis to resolve the issue. In only one case, *Zschernig v. Miller*, 389 U.S. 429 (1968) ("*Zschernig*"), has this Court gone outside that conflict analysis and instead relied on a dormant foreign affairs preemption, not requiring any conflict or, indeed, any activity by the federal government whatsoever, to invalidate state action.

The *Zschernig* case, however, was based on very unique facts and, until *Von Saher*, had been confined to those facts. *Von Saher* has now extended *Zschernig* and this Court's much more recent *Garamendi* decision and has dangerously opened the door to an expansive dormant foreign affairs preemption of state law that could have wide-ranging negative implications.

A. Pre-*Garamendi* Cases Other Than *Zschernig* Have Relied On Conflict Preemption

Pre-*Garamendi* cases other than *Zschernig* were consistent in their use of conflict preemption to invalidate state laws or conduct that interfered with the federal government's foreign affairs power. In *United States v. Belmont*, 301 U.S. 324 (1937) and

United States v. Pink, 315 U.S. 203 (1942), this Court gave preemptive effect to an executive agreement recognizing the government of the Soviet Union, thereby barring conflicting state policies regarding the legality of Soviet expropriation of foreign property. Around this same period, this Court engaged in a traditional Article VI Supremacy Clause analysis to hold that the federal Alien Registration Act, 54 Stat. 670, ch. 439 (1940), preempted Pennsylvania's conflicting Alien Registration Act. *Hines v. Davidowitz*, 312 U.S. 52 (1941). Later, in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), this Court concluded that a federal statute prescribing limited economic sanctions against Burma (now Myanmar) preempted a similar but more restrictive regulation by Massachusetts.[2]

These decisions each involved federal government action and each reflected a determination that the federal government's action when dealing with foreign affairs had supremacy over state law or conduct that conflicted or interfered with the federal government's exercise of power. By contrast, only a

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[2] In *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936), the Court upheld a criminal charge of conspiracy to sell arms of war to a foreign government in violation of a joint resolution of Congress. Later, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), this Court addressed the effect of emergency executive orders made pursuant to an executive agreement, impliedly consented to by Congress, that ended the Iran hostage crisis of 1980. Based on those orders, this Court nullified a prejudgment attachment of assets of certain Iranian banks and suspended the common law claims of American nationals against Iran.

single decision of this Court, *Zschernig*, has appeared to recognize a dormant federal foreign relations preemption that excludes states from certain foreign relations activity even in the absence of conflicting federal activity. *Zschernig*, however, is limited to the distinct circumstance of a state law that, when applied, fostered criticism and hostility toward foreign governments.

In *Zschernig*, this Court invalidated an Oregon inheritance statute that prevented residents of foreign countries from inheriting through Oregon estates unless their government granted reciprocal rights to Oregon residents. Earlier, this Court had upheld a similar California statute, dismissing a claim based on the foreign affairs effects of the statute as "farfetched." *Clark v. Allen*, 331 U.S. 503, 517 (1947) ("*Clark*"). But in *Zschernig*, this Court became concerned that the Oregon statute and others like it, as applied, had become a vehicle for inflammatory, "Cold War" criticism of foreign governments – especially Communist governments – by the states. 389 U.S. at 433-35, 439, 440 & nn.6,8.

It was not the existence of reciprocal inheritance statutes that caused the problem in *Zschernig* (or else *Clark* would have been decided differently), but rather the critical, hostile way that they were applied. Later cases confirm this reading, applying *Zschernig* by assessing whether the challenged statute, on its face or as applied, criticizes or shows hostility toward foreign governments. *See, e.g., Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 56 (1st

Cir. 1999), *aff'd sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Trojan Techs. v. Pennsylvania*, 916 F.2d 903, 913-14 (3d Cir. 1990) (upholding under *Zschernig* a state commercial regulation disadvantaging foreign business but not targeting any country or group of countries); *Cruz v. United States*, 387 F. Supp. 2d 1057, 1075 (N.D. Cal. 2005) (holding that a California law, which lifted the bar of the statute of limitations for certain claims filed by "braceros" and their heirs, was not preempted under the foreign affairs doctrine, and noting that *Zschernig* has been "applied sparingly"); *see also* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1242 (1999) (observing that the *Zschernig* decision "seems both explained and justified [at least at the time] by its Cold War context").

Zschernig has largely been applied to invalidate state regulations that amounted to embargoes or boycotts aimed at coercing foreign states to alter their political and social policies. *See, e.g. Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (striking down Illinois tax provision that discriminated against South African coins, because "sole motivation was disapproval of [South Africa's] policies" and "encouraging a boycott" of South African products); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1378 (D.N.M. 1980) (invalidating state university's policy of excluding Iranian students from admission in retaliation for the Iranian hostage crisis); *New York Times Co. v. City of New York*

Comm'n on Human Rights, 361 N.E.2d 963 (N.Y. 1977) (affirming reversal of municipal agency's ruling that newspaper advertisements for employment in South Africa implicitly violated city antidiscrimination laws). Describing the limited reach of these cases, another district court explained that "[i]n these cases, the state enactments not only used state commercial power as a tool of foreign policy, their mere existence articulated state condemnation of a foreign nation's conduct by passing the statutes." *Cruz*, 387 F. Supp. 2d at 1076.

B. The *Garamendi* Decision Confirmed The Narrow Scope Of Dormant Or Field Preemption In The Area Of Foreign Affairs And Adopted And Applied A Conflict Preemption Analysis In Invalidating A State Statute Intended To Benefit Holocaust Survivors

In *Garamendi*, this Court invalidated on foreign affairs preemption grounds a California statute that compelled insurers and their affiliates to disclose information regarding insurance policies issued in Europe during the period between 1920 and 1945. In so holding, the Court adopted and applied a conflict preemption analysis, balancing the state's regulatory interest against the federal government's expressed foreign policy interest.

Significantly, the Court pursued a conflict preemption analysis notwithstanding its belief that the statute was enacted to assist Holocaust survivors in

vindicating Holocaust-era European insurance claims, rather than serve a traditional consumer protection interest. *Garamendi,* 539 U.S. at 425-26. In the Court's view, this perceived purpose did not doom the statute on dormant or field preemption grounds; if the statute had failed on those grounds, the Court would have said so and would not have engaged in a lengthy conflict preemption analysis. Instead, the apparent weakness of the state's regulatory interest, when viewed "against the backdrop of traditional state legislative subject matter", was simply a factor to be evaluated in determining the extent of conflict with federal foreign policy. *Id.* at 425-27.

Before embarking on its conflict analysis, the *Garamendi* Court discussed *Zschernig*. Although not rejecting *Zschernig's* dormant foreign affairs preemption (which the Court described as "field preemption"), the Court expressly confined the potential outer boundaries of that preemption to a narrow circumstance – namely, "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," then field preemption "*might* be the appropriate doctrine." *Garamendi,* 539 U.S. at 420, n.11 (emphasis added).

Indeed, to emphasize that it was not expanding *Zschernig*, the Court discussed in some detail and implicitly endorsed Justice Harlan's concurring opinion in *Zschernig*. *See Garamendi,* 539 U.S. at 418-20 & n.10. In his concurring opinion in *Zschernig*, Justice Harlan had asserted that the majority's view

of dormant foreign affairs preemption went too far. *Zschernig*, 389 U.S. at 459. Instead, he said that he would find preemption only where there was a "conflicting federal policy," and all of the cases he cited as examples of "federal policy" preempting state law involved statutes or treaties. *Id.* at 458-59 & n.25.

Later cases have all recognized that after *Garamendi*, the linchpin of foreign affairs preemption is "the existence of an actual conflict between the state [statute] at issue and clearly articulated federal policy." *Cruz*, 387 F. Supp. 2d at 1075. *See also Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1184 (E.D. Cal. 2007) ("The court concludes that *Zschernig*, together with cases that follow it, including *Garamendi*, hold that a party asserting preemption on the ground of foreign policy preemption must show 'clear conflict' between a state law or program and the functioning of some agreement, treaty, or program that is the product of negotiations between the administrative branch and a foreign government."); *Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 396 (D. Vt. 2007) ("Preemption is thus required under *Garamendi* if the plaintiffs have demonstrated a clear conflict between the state law and an express national foreign policy."); *Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60, 85-88 (D.D.C. 2007) ("Under *Garamendi*, Iraq must identify a 'conflict of a clarity or substantiality that [varies] with the strength or the traditional importance of the state concern

asserted.'"); *Doe v. Exxon Mobil Corp.*, 2006 WL 516744 at *7-8 (D.D.C. March 3, 2006) (holding that under the foreign affairs doctrine as articulated by *Garamendi*, "state laws are preempted when there is a conflict between the state law and the 'exercise of the federal executive authority,'" and holding *Garamendi* "simply not applicable" because "no state government has passed any statute in conflict with U.S. foreign policy").[3]

This settled law has now been abandoned by the *Von Saher* decision. That decision has expanded foreign affairs preemption far beyond its recognized boundaries and, unless corrected by this Court, threatens to undermine the careful balance between state regulation and the federal government's foreign affairs power that has been followed by this Court.

III. *VON SAHER* MISAPPREHENDED AND MISAPPLIED *GARAMENDI* AND ITS PROGENY, RESULTING IN AN EXPANSIVE, AND LEGALLY INCORRECT, INTERPRETATION OF FOREIGN AFFAIRS PREEMPTION

California Code of Civil Procedure section 354.3 extends the statute of limitations on claims for the

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[3] This view is consistent with the fact that, as a general matter, field preemption has been "frequently rejected" by this Court "in the absence of statutory language expressly requiring it." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting).

recovery of Holocaust-era artwork from museums or galleries subject to jurisdiction in the state until December 31, 2010. That extension, which implicitly recognizes the difficulty inherent in identifying, locating, and making claims on such artwork, is consistent with the federal government's policy that such artwork should be returned to their rightful owners, through litigation if necessary. *See* J. Christian Kennedy, Special Envoy for Holocaust Issues, *The Role of the United States in Art Restitution*, Remarks at the Conference in Potsdam, Germany (April 23, 2007), http://germany.usembassy.gov/kennedy_speech.html.

The statute is not directed at or critical of any foreign country, does not create any right or claim against any foreign government, and is instead limited to actions for the recovery of artwork from museums or galleries.

Respondent, a museum located in California, successfully challenged the statute on foreign affairs preemption grounds in the district court, and Petitioner appealed to the Ninth Circuit. A majority of a panel of that court, while expressly finding that "[t]he statute does not . . . conflict with any current foreign policy espoused by the Executive Branch" (592 F.3d at 963), nevertheless affirmed that the statute was preempted under the foreign affairs doctrine.

This unprecedented result followed from the majority's holding that even in the absence of a conflict with federal policy or criticism of a foreign

government, the statute nonetheless "infringed on a foreign affairs power reserved by the Constitution exclusively to the national government" – *i.e.* it was preempted by the federal government's "dormant" foreign affairs power. 592 F.3d at 964-68. The court reached that remarkable conclusion by finding that the statute's subject matter was not in an area of "traditional state responsibility" and was "therefore subject to a field preemption analysis." *Id.* at 965.

The court acknowledged that California "has a legitimate interest in regulating the museums and galleries operating within its borders, and preventing them from trading in and displaying Nazi-looted art." 592 F.3d at 965. But, since the statute applied to any museum or gallery subject to personal jurisdiction in the state, including those located outside its borders, the court divined that "California's 'real purpose' was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the state." *Id.*

The court then concluded that the federal government's "power to wage and resolve war" included "the power to legislate restitution and reparation claims" and that such power "has been reserved exclusively to the national government by the Constitution." 592 F.3d at 967. Since, according to the court, the statute's "real purpose" intruded into this exclusive federal domain, California lacked the power to act. *Id.* at 967-68.

The Ninth Circuit's analysis is fundamentally flawed and not reconcilable with *Garamendi*. Unless corrected, *Von Saher* will likely lead to unwarranted preemptions of state law.

The majority in *Von Saher* began veering off the road by attempting to determine whether the California statute concerned a "traditional state responsibility." 592 F.3d at 964-65. Finding the statute too broad (since it covered museums and galleries outside the state), the court concluded that the statute was not addressing a "traditional state responsibility" and must therefore reflect an expression of California's "dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of World War II." *Id.* at 965. It followed, then, according to the Ninth Circuit majority, that the statute was invalid even in the absence of any conflict with federal policy. *Id.*

The Ninth Circuit's perception that section 354.3 did not concern a "traditional state responsibility" is unsupported. Such responsibilities surely include legislation that allows and facilitates the recovery of stolen property, and legislation that recognizes disabling circumstances that might prevent the timely filing of claims under more general statutes of limitation. Other California statutes, for example, expressly toll or extend the limitations period for bringing lawsuits in situations where there might be some impediment to the claim being brought within the time period allowed by more general limitations statutes. *See, e.g.*, California Code of Civil Procedure

§337.15 (establishing 10-year limitations period for claims involving latent defects in real property); California Code of Civil Procedure §340.7 (tolling limitations period for Dalkon Shield claimants); California Code of Civil Procedure §352.1 (tolling limitations period for claimants who are imprisoned).

Nor does it follow that the breadth of the statute disqualifies it as one concerning "traditional state responsibilities" or converts it into a foray into foreign affairs. Similarly, contrary to the Ninth Circuit's apparent speculation, there is nothing to suggest that the statute's breadth reflects some dissatisfaction with federal government restitution efforts. And finally, even if some dissatisfaction with the federal government was apparent from the statute, that fact is not evidence of an interference with foreign affairs that this Court has recognized as requiring preemption.

But the real problem with *Von Saher* is this: even if the scope, purpose or tradition of the state statute are legitimate subjects of inquiry, the Ninth Circuit considered and applied those factors to the wrong preemption doctrine. Those factors, if relevant at all, should only be evaluated in assessing whether there is conflict preemption – whether there is a conflict between the state statute and a treaty, federal statute, executive agreement or express federal policy. "[I]t would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring a state law preempted."

Garamendi, 539 U.S. at 420. *See also Garamendi*, 539 U.S. at 425-27. The Ninth Circuit expressly found no conflict in *Von Saher*.

Those factors should not be employed, where there is no conflict and no criticism of a foreign government, to invalidate a state statute on dormant (field) foreign affairs preemption grounds. Neither *Garamendi* nor *Zschernig* go that far. To the contrary, *Garamendi* teaches that dormant foreign affairs preemption should be invoked only where the state law or conduct criticizes a foreign government or perhaps (and just perhaps) where a state "take[s] a position on a matter of foreign policy, with no serious claim to be addressing a traditional state responsibility." 539 U.S. at 417-20 & n.11.

If the *Von Saher* majority were correct, then the lengthy conflict analysis in *Garamendi* was superfluous and unnecessary. If the *Von Saher* majority were correct, then presumably this Court would have relied on the perceived overbreadth of the disclosure statute and apparent weakness of the state's traditional regulatory interest in *Garamendi* and simply voided the statute there on field preemption grounds – an intrusion into an area of exclusive federal power.

But this Court did not do that. This Court did not employ a dormant or field preemption analysis, because the statute in *Garamendi* (like the one here) neither criticized a foreign government nor took a position on a matter of foreign policy. This Court instead evaluated the breadth of the disclosure

statute and the strength of the state's regulatory interest as part of its conflict analysis, balancing the state's interest against the federal government's expressed foreign policy interest.

In light of *Von Saher*, this Court should reconfirm the limits of the federal government's foreign affairs preemption power.

IV. UNLESS REVERSED BY THIS COURT, *VON SAHER* THREATENS TO OPEN STATE LAWS TO FOREIGN AFFAIRS ATTACKS ON MATTERS THAT ARE NOT IN CONFLICT WITH FEDERAL LAW OR EXPRESSED POLICY AND DO NOT CRITICIZE FOREIGN GOVERNMENTS

Unless checked, *Von Saher* threatens to preempt virtually any state regulation dealing with a matter that might be thought to have foreign implications, even where the federal government has not spoken (or, as here, where the federal government has expressed support for the state action). This Court, in *Garamendi* and earlier cases, did not sanction that result.

A. The Ninth Circuit's Test Is Vague And Subjective And Makes The Courts Rather Than The Executive Or Congress The Primary Arbiters Of When States Have Improperly Intruded Into Foreign Affairs

The Ninth Circuit's broad test to preempt state laws in the absence of any conflicting federal law or policy raises numerous concerns. First, "[p]olitical protections for state interests are absent when the unelected federal judiciary preempts state law under a foreign relations rationale without any apparent political branch authorization." Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1678 (1997). The legislature and the executive are more familiar with the nation's foreign policy and are better suited to determine when state laws pose a genuine threat to foreign relations. *See* Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy*, 40 AKRON L. REV. 647, 686 (2007); Goldsmith, *supra*, 83 VA. L. REV. at 1684. Moreover, "giving broad preemption power to the judiciary may result in diverse decisions by lower courts in the same area of foreign relations, creating further confusion." Robinson, *supra*, 40 AKRON L. REV. at 686. Where the actual impact on national policy is unclear (*i.e.*, "dormant"), judges should not "broaden their own authority to decide when national interests require preemption of state and local legislation." *See* Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light*

of Translocal Internationalism, 57 EMORY L.J. 31, 84 (2007).

In addition, the Ninth Circuit's "traditional state responsibility" test is fraught with ambiguity and subjectivity. State laws can be "framed in ways that make them seem either traditional or nontraditional, depending on how one views their purposes and at what level of abstraction one characterizes them." *Note: Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877, 1896 (2006). As this Court noted in the context of the state immunity doctrine, "[a]ny rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

In *Garcia*, this Court rejected as "unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional,'" explaining that "[a]ny such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles." *Id.* at 546-47; *see also United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 368-69 (2007) (Alito, J., dissenting) ("[T]his

Court has previously recognized that any standard that turns on a judicial appraisal of whether a particular governmental function is integral or traditional is unsound in principle and unworkable in practice. . . . Thus, to the extent today's holding rests on a distinction between traditional governmental functions and their nontraditional counterparts, it cannot be reconciled with prior precedent.") (internal citations and quotation marks omitted).

Limiting the dormant field preemption test to the facts of *Zschernig* – that is, to circumstances where the state law fosters criticism of a foreign government – would rein in the courts' broad discretion, alleviate the problem of subjectivity, and bring the doctrine back in line with this Court's past decisions. Such a limitation would not give the states free rein. Where a state law is beyond the scope of *Zschernig* – and, thus, beyond the reach of the courts – the executive or legislative branches of the federal government could step in if they believe the state law affects the federal government's ability to conduct foreign affairs. *See* Robinson, *supra*, 40 AKRON L. REV. at 676 ("If localities' actions damage U.S. foreign policy interests, the federal government can easily preempt the state or local policies in question."); Goldsmith, *supra*, 83 VA. L. REV. at 1678-79 ("[O]ur constitutional democracy normally depends on the elected federal political branches to correct this sort of problem."). While various types of state laws might have implications that extend beyond U.S. borders, it is really for the

political branches of the government, not the judiciary, to decide whether those laws intrude on the foreign relations. Absent a "clear conflict" with federal law or presidential foreign policy as found in *Garamendi*, or criticism directed at a foreign government as found in *Zschernig*, the courts should not strike down state laws on grounds of foreign affairs preemption.

B. The Ninth Circuit's Expanded Dormant Foreign Affairs Preemption Test Will Subject A Broad Range Of Socially-Motivated State Laws To Preemption Scrutiny

As several commentators in law and political science have recognized, "globalization makes state participation in foreign affairs inevitable." *See* Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1676 & n.191 (2008); *see also* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1672 (1997) ("[A]s the world becomes more interconnected, domestic law and activity increasingly have foreign consequences, and vice versa.").

Foreign affairs was traditionally understood as relations between national governments, where the main concerns were military and diplomatic issues and the primary participants were the executive branches of the national governments. *See* Goldsmith, *supra*, 83 VA. L. REV. at 1670. Today, that has

changed. Issues as diverse as trade, investment, technology and energy transfers, environmental and social issues, cultural exchanges, migratory labor, drug traffic and epidemics have entered the foreign policy arena. *See* Goldsmith, *supra*, 83 VA. L. REV. at 1671; *see also* Young, *supra*, 83 NOTRE DAME L. REV. at 1676 ("'[G]lobalization makes everything international,' so that many if not most things states do – whether it is regulating highway safety, or adjudicating contract or tort suits, or executing their own citizens that commit capital crimes, may well implicate foreign affairs in one way or another."). Thus, foreign relations have come to encompass numerous issues traditionally regulated by the states, and there is no clear line dividing "foreign affairs" from traditional areas of state regulation.

State law-making in these diverse areas is vital to our political system. It allows the states to express the core values and local interests of their citizens. And it allows citizens to "more fully shape their lives, create a nation-wide system of policy experimentation, and provide a check on federal and international power." Robinson, *supra*, 40 AKRON L. REV. at 697. "[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Robinson, *supra*, 40 AKRON L. REV. at 679-80.

The role of the states as laboratories for innovation has been instrumental in shaping our country's

history and values. "[H]istory has shown localities were often on the forefront of causes of justice." Robinson, *supra*, 40 AKRON L. REV. at 684 (noting the northern states' ban on slavery when it was condoned by the federal government, and the western states' leadership in pushing for women's suffrage). Here, California recognized the unique legal and logistical obstacles faced by Holocaust survivors as they try to locate and recover artwork looted during World War II. In response, the state extended the statute of limitations on such claims to provide Holocaust survivors and their heirs sufficient time to finance, investigate and commence an action to recover their artwork.

As noted in Von Saher's Petition, the Ninth Circuit's decision could have negative implications for numerous Holocaust-related state statutes. *See* Petition at 22-25 and nn.5-8. But the implications of the Ninth Circuit's decision are not limited to statutes involving Holocaust survivors. The decision could affect countless other socially-motivated state laws that have been or may be enacted, including laws aimed at promoting human rights or environmental interests. "[T]he changing nature of international regulation and concern means that even domestic law that applies to domestic persons for domestic acts can implicate foreign relations." Goldsmith, *supra*, 83 VA. L. REV. at 1672.

Environmental policy, which was formerly an area of local or national concern, has become internationalized. *See* Robinson, *supra*, 40 AKRON L. REV.

at 680. State regulation in this area has great potential benefits: "localities can experiment with creative new environmental policies, defraying risk for the country and creating support for successful policies." Robinson, *supra*, 40 AKRON L. REV. at 680. But, while states have long regulated air pollution, vehicle emissions and electricity generation, the overarching issues of climate change and greenhouse gas emissions are "unavoidably global in scope." *See* 119 HARV. L. REV. 1877, 1896. Under the Ninth Circuit's expanded dormant preemption test, a state environmental statute enacted with the goal of effecting change outside state borders might be subject to challenge. *See, e.g.*, Resnik, *supra*, 57 EMORY L.J. at 77 (noting that state laws relating to Kyoto might be preempted under the increasingly broad doctrine of foreign affairs preemption).

In addition, state laws differ on issues such as the death penalty, public benefits for illegal immigrants, gay marriage, and stem-cell research. *See* Robinson, *supra*, 40 AKRON L. REV. at 695-97. These differences reflect the local interests and values of the states, and each of these areas has the potential to implicate foreign relations. For example, certain states' continued use of the death penalty has sometimes put a strain on diplomatic relations with countries that oppose the death penalty. *See id.* at 695. States take different positions on illegal immigrants' eligibility for certain public benefits, and

those positions have obvious potential to impact foreign relations. *See id.* at 696-97. Likewise, states' decisions whether or not to recognize same-sex marriages and civil unions consummated abroad could give rise to conflicts with countries allowing such unions. *See id.* at 696. And, because of differing views about what constitutes human life, "[t]he issues surrounding cloning and stem-cell research all have the potential to insult the moral sensibilities of the citizens and governments of foreign countries and become diplomatic issues in the future." *See id.*

In sum, modern foreign affairs covers a wide range of issues, and "it would be extraordinary if the states were preempted from all of these areas merely because of their potential entanglement with foreign affairs." *See* Daniel A. Farber, *Climate Change, Federalism, and the Constitution,* 50 ARIZ. L. REV. 879, 904-09 (2008). The Ninth Circuit's ruling in *Von Saher* failed to follow this Court's narrowly-defined doctrine of dormant foreign affairs preemption and threatens to set a dangerous precedent for the future.

V. CONCLUSION

This Court should grant Petitioner's Petition for a writ of certiorari in order to allow the Court to address the impermissibly broad reading that the

Ninth Circuit has given to the foreign affairs preemption doctrine.

Respectfully submitted,

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In The
Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA and NORTON SIMON ART FOUNDATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATE OF CALIFORNIA AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The State of California will address the following question presented:

In enacting a state statute extending the statute of limitations applicable to claims for the recovery of property stolen during the Holocaust against museums and galleries, was the State of California addressing an area of "traditional state responsibility" without intruding on the federal foreign affairs power?

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INTEREST OF THE STATE OF CALIFORNIA

Pursuant to Rule 37.4, Edmund G. Brown Jr., the Attorney General of California, submits this brief on behalf of the State of California in support of the petition for a writ of certiorari filed by petitioner, Marei Von Saher.[1] Petitioner seeks review of a Ninth Circuit decision invalidating a California statute that extends the limitations period in which plaintiffs may seek the recovery of artworks looted during the Nazi-era. California Code of Civil Procedure, Section 354.3, extends the limitations period for such claims against art museums or galleries until December 31, 2010.[2]

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[1] Counsel of record for the parties received timely notice of the State of California's intent to file this amicus curiae brief ten days before the due date in compliance with Supreme Court Rule 37.2(a).

[2] Section 354.3 states:

> (a) The following definitions govern the construction of this section:
>
> (1) "Entity" means any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.
>
> (2) "Holocaust era artwork" means any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive.
>
> (b) Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust era artwork, may bring an action to recover Holocaust era artwork from any entity described in paragraph (1) of subdivision (a). Subject to Section 410.10, that action may be brought in a superior court of this state, which court shall have jurisdiction over

(Continued on following page)

California has a compelling interest in preserving its ability to regulate in areas of traditional state responsibility and in defending its lawfully enacted statutes where they do not conflict with federal law or foreign policy. Here, the Ninth Circuit invalidated a statute that regulates in an area of traditional state competence, conceding that the statute does not conflict with any federal foreign policy or law. In doing so, the Ninth Circuit broadened the application of field preemption in the context of the foreign affairs doctrine to such an extent that it threatens to upset the proper balance of power our federal system demands. This Court has explained that "even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy." *United States v. Pink*, 315 U.S. 203 (1942).

STATEMENT

Petitioner filed this action in 2007, seeking the return of two paintings allegedly looted from her

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that action until its completion or resolution. Section 361 does not apply to this section.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

Cal. Civ. Proc. § 354.3 (West 2006).

relative by the Nazis during World War II. Petition Appendix (Pet. App.) at 4a, 8a. The paintings were subsequently purchased in or around 1971 by respondent Norton Simon Museum of Art in Pasadena, California, and are currently on display there. *Id.* at 4a.

Respondent filed a motion to dismiss plaintiff's complaint, which the district court granted on the ground that Section 354.3 is unconstitutional because it violates the foreign affairs doctrine, relying on *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003). Pet. App. at 10a.[3] The Ninth Circuit in the present case affirmed, concluding that "§ 354.3 intrudes on the power to make and resolve war, a power reserved exclusively to the federal government by the Constitution." *Id.* at 25a.

Significantly, the Ninth Circuit specifically determined that Section 354.3 "does not . . . conflict with any current foreign policy espoused by the Executive Branch." Pet. App. at 19a. Nonetheless, the court reasoned that "[u]nlike its traditional statutory counterpart, foreign affairs field preemption may occur 'even in [the] absence of a treaty or federal statute, [because] a state may violate the Constitution by establishing its own foreign policy.'" *Id.* at 20a, citing *Deutsch*, 324 F.3d at 709. The circuit court then concluded that

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[3] In *Deutsch*, the Ninth Circuit invalidated a provision of the California Code of Civil Procedure that extended the statute of limitations for claims by victims of World War II-era forced or slave labor, or their heirs. *Deutsch*, 324 F.3d at 708.

"[b]y enacting § 354.3, California 'seeks to redress wrongs committed in the course of the Second World War,'" a motive that the court said had been found to be fatal in *Deutsch*. *Id*. at 25a-26a.

The Ninth Circuit correctly recognized that the regulation of property claims is traditionally a state function. Pet. App. at 21a-22a. That court also correctly determined that Section 354.3 does not directly conflict with any federal foreign policy and that this Court has "seldomly" invalidated a state law under the foreign affairs doctrine where it does not "conflict with a federal law or policy." *Id*. at 19a-20a. In addition, the court seemed to accept this Court's guidance that field preemption in the context of the foreign affairs doctrine should be limited to those circumstances where a State seeks to regulate outside of the areas of its traditional responsibility. *Id*. at 23a-25a.

However, from there the Ninth Circuit veered into dangerous new territory, concluding that Section 354.3 did not address a matter of traditional state responsibility because the statute did not limit its application to defendants within California. From that fact, the Ninth Circuit boldly declared that the statute's real goal was not to regulate the recovery of stolen property at all, but rather to create a world-wide forum for the resolution of Holocaust restitution claims. The Ninth Circuit concluded that, because the law, in the court's unsupported view, did not regulate in an area of "'traditional state responsibility,'" it was "subject to a field preemption analysis." Pet. App. at 25a.

The circuit court's reasoning threatens the legitimate power of California and other Ninth Circuit states to regulate matters within the scope of their traditional responsibilities.

ARGUMENT

I. THE NINTH CIRCUIT EFFECTIVELY EXPANDED THE DOCTRINE OF FIELD PREEMPTION AS IT RELATES TO THE FOREIGN AFFAIRS DOCTRINE BEYOND WHAT THIS COURT HAS LAID OUT IN *ZSCHERNIG* AND *GARAMENDI*

This Court has not yet answered the question whether or when it is appropriate to apply field-preemption analysis in the context of the foreign affairs doctrine. In *American Ins. Assn. v. Garamendi*, 539 U.S. 396 (2003), this Court noted that it was still "a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption." *Garamendi*, 539 U.S. at 420. While not deciding the issue, this Court did offer some guidance, stating that field preemption might be appropriate "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." *Id.* at 419, n. 11. However, the Court observed that where "a State has acted within . . . its 'traditional competence,' [citation] but in a way that affects foreign relations, it might make good sense to require a conflict,

of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted." *Id.* This Court added that "the strength of the federal foreign policy interest" might also need to be weighed. *Id.*

Garamendi involved a challenge to California's Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 (West 2005). The statute required any insurer doing business in the state to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or anyone "related" to the company. This Court pointed out that the statute "single[d] out only policies issued by European companies, in Europe, to European residents, at least 55 years ago." *Garamendi*, 539 U.S. at 426. Despite the clear extra-territorial aspect of the statute, this Court did not apply field preemption. Rather, the Court concluded that the "question relevant to preemption in [the] case [was] conflict." *Id.* at 427. The California statute was in "clear conflict" with federal policy. *Id.* at 420. The Court observed that the United States and Germany had specifically agreed to work with the International Commission on Holocaust Era Insurance Claims, a voluntary organization formed by several European insurance companies; the State of Israel; Jewish and Holocaust survivor associations; and associations of insurance commissioners to resolve insurance claims. The Court reasoned that, by adopting its own method of addressing Holocaust-era insurance claims, California sought "to use an iron fist where the President

has consistently chosen kid gloves." *Id.* The Court instructed that "state law must give way where, as here, *there is evidence of clear conflict* between the policies adopted by the two." *Id.* at 421 (emphasis added).[4]

Garamendi's relevance to the application of field preemption is its instruction that if the analysis is appropriate at all in the context of the foreign affairs doctrine, it is appropriate when a State has "no serious claim to be addressing a traditional State responsibility." *Garamendi*, 539 U.S. at 419, n. 11. In *Garamendi* this Court expressly did not resolve the question whether California's insurance statute addressed a traditional state responsibility because the state law at issue directly conflicted with federal policy. *Id.* at 419-420.

On the other hand, in *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court invalidated an Oregon probate law without finding a specific conflict with any federal treaty, agreement, or foreign policy. The law at issue there prohibited nonresident aliens from claiming real or personal property unless the countries of their citizenship or residence provided certain reciprocal rights to United States citizens, and the

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[4] Four members of this Court, Justices Ginsberg, Stevens, Scalia and Thomas, would have upheld the law at issue in *Garamendi*, citing the absence of "a clear statement aimed at disclosure requirements by the 'one voice' to which courts properly defer in matters of foreign affairs." *Garamendi*, 539 U.S. at 430 (Ginsberg, J., dissenting).

foreign heirs could prove that their inheritance would not be confiscated by the governments of their countries. *Zschernig,* 389 U.S. at 430-431. This Court observed that, although the law on its face may have been a valid probate law, in applying it courts had engaged in "minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should 'not preclude wonderment'" about whether others had been denied that right. *Zschernig,* 389 U.S. at 435. Such foreign affairs- and international relations-matters, this Court said, are entrusted by the Constitution solely to the federal government. *Id.* at 436.

Thus, this Court has strongly suggested that field preemption is appropriate, if at all, where a State has attempted, either expressly or in actual practice, to regulate in an area of foreign affairs outside of the State's traditional area of responsibility. Where a State regulates *within* such areas, the Court has suggested that an actual conflict with federal foreign policy should be shown to exist for the law to be preempted. The Ninth Circuit's erroneous determination that Section 354.3 addresses matters outside of California's traditional areas of responsibility led the court to apply field-preemption analysis to a statute that properly should be subjected to conflict-preemption analysis. The court acknowledged that the regulation of property is a traditional state function. Pet. App. at 21a-22a. Nonetheless, it found

that Section 354.3 addresses "restitution for injuries inflicted by the Nazi regime during Word [sic] War II" (*id.* at 28a), based solely on the significance the court attached to the Legislature's decision not to limit the law to museums and galleries located within California. As a result, the court erased the line between legitimate state authority and exclusive federal foreign affairs power, invalidating a state law that facially addresses property claims and that manifestly does not conflict with federal foreign policy.

II. THE NINTH CIRCUIT WRONGLY DETERMINED THAT SECTION 354.3 INTERFERES WITH THE FEDERAL GOVERNMENT'S ABILITY TO MAKE AND RESOLVE WAR

The foreign affairs doctrine preempts States' efforts to make their own foreign policy or to alter foreign policy set by the federal government. California attempted neither by enacting Section 354.3. By extending the limitations period for claims to recover artworks looted during the Holocaust, California has not injected itself into relations with foreign countries or with former wartime enemies. Neither has it sought to modify any prior federal resolution of these claims or alter any federally-established process for such resolution. Indeed, the Ninth Circuit expressly found no conflict with any existing federal foreign policy. California simply did not intrude into the realm of foreign affairs reserved

to the federal government when it enacted Section 354.3.

This Court has recognized a "foreign affairs doctrine" culled from several provisions of the Constitution, which reserves foreign affairs powers exclusively to the federal government. *See United States v. Pink*, 315 U.S. at 230-234. In accord with this doctrine, where state laws impair the effective exercise of the Nation's foreign policy, they must yield. *Garamendi*, 539 U.S. at 419, quoting *Zschernig*, 389 U.S. 429, and *Pink*, 315 U.S. at 230-231. Section 354.3 does not intrude upon these powers.

Section 354.3 only extends the statute of limitations on claims brought against *museums and galleries*; it does not target foreign governments or officials. Such claims are not necessarily brought by victims of the war against wartime enemies or their collaborators. The claims do not seek to redress the wartime wrongs of foreign governments. The claim presented in this case illustrates as much. It is brought against a museum that has no alleged connection to the Holocaust, the Nazi regime, or the conduct of World War II, and that did not acquire the artwork in question until 1971.

The Ninth Circuit erred in determining that Section 354.3 seeks to regulate in an area reserved exclusively to the federal government and, therefore, in invalidating Section 354.3 on field preemption grounds. Further, as was discussed above, field-preemption analysis was not applicable in the first

instance, as Section 354.3 regulates in an area of traditional state responsibility – property – and does not conflict with federal foreign policy.

CONCLUSION

For all the reasons set forth above, the State of California respectfully urges this Court to grant the petition for a writ of certiorari.

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IN THE

Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA and NORTON SIMON ART FOUNDATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* COMMISSION FOR ART RECOVERY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The vortex of victimization of claimants seeking to recover property lost or stolen during the Holocaust continues. The Ninth Circuit Court of Appeals has closed a final window of opportunity. Making an unwarranted connection between pursuit of converted property under state law and the power of the federal government concerning foreign policy, the court has extinguished a realistic and practical approach to resolve questions of title to property acquired through atrocity.

Precisely because there are uniquely incalculable impediments to discovery – witnesses who are dead; documentation that is lost, hidden or destroyed; and locations that are often unknown – Nazi-looted property, which has been located after an odyssey of horror, deserves recognition with an extended statute of limitations. To do otherwise dishonors not only property rights, but also fundamental fairness and decency.

The Commission for Art Recovery ("CAR") is dedicated to supporting the search for lost artworks and restitution to rightful owners.[1] That arduous

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its

process, given the length of time, the need to identify victims, places, supporting documentation for authentication of provenance and often, the art itself, including lost family histories of title and possession, gives special urgency to the availability of California's extended statute of limitations for Holocaust-era artwork.

Hitler's Nazi regime looted approximately twenty percent of Western art during World War II. *See* Commission for Art Recovery, Cases and Experience, http://www.commartrecovery.org/cases.php. Even now, sixty-plus years after the fall of the Third Reich, a huge amount of these items remain missing, displaced, or destroyed. *Id.* Indeed, "[e]xperts have estimated that as many as 600,000 paintings were stolen, of which more than 100,000 are still missing. When furniture, china, rare books, coins, and items of the decorative arts are included, the numbers swell into the millions." Stuart E. Eizenstat, Head of U.S. Delegation to the Prague Holocaust Era Assets Conferences, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference*, Prague Conference on Holocaust-Era Assets, Czech Republic (June 28, 2009) http://www.state.gov/p/eur/rls/rm/2009/126158.htm.

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preparation or submission. The parties have been given appropriate notice of *amicus curie*'s intention to file and have consented to the filing of this brief. Such consents are being lodged herewith.

CAR is a non-profit organization dedicated to promoting restitution efforts for artworks that were seized, confiscated, or wrongfully taken as a result of the Holocaust and Nazi policies. CAR works with governments, museums, and various institutions to research, identify, and publicize works in their collections which may have tainted ties to the Nazi era. CAR's efforts take the form of researching, monitoring, and supporting policy and legislative change where needed. CAR also works directly with claimants to assist in recovery of looted art.

Significantly, CAR encourages streamlined procedures for returning any such objects to their rightful owners. Many collections were amassed over several generations, and their rightful owners are denied an important connection to their past if governments and museums use legal technicalities to retain art contaminated by wrongful acquisition.

As part of its work, CAR lobbies in Europe to convince governments to improve their claims procedures and other regulations, thereby fostering a favorable environment for Holocaust victims and their heirs to bring restitution claims. CAR intends to expand this effort to the United States by petitioning individual States to adjust their statutes of limitations, allowing for claimants to obtain decisions based upon the merits of each case.

CAR's interest in this case stems from its concern that the Ninth Circuit decision holding Cal. Code Civ. Proc. § 354.3 unconstitutional will have far-reaching effects beyond the State of California. As noted above, CAR intends to lobby at the state level to have statutes of limitations extended for claimants seeking restitution of art looted by Nazis or taken during World War II. The Ninth Circuit's decision in *von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010), however, serves to encourage museums and others possessing objects with a Nazi past to continue using technical defenses. Specifically, CAR fears this ruling will dissuade other states from passing similar legislation extending their own statutes of limitations for Holocaust-era claims out of fear that they, too, will be deemed unconstitutional.

The inability or reluctance of other states to pass similar legislation will impact, negatively, the ongoing battle to return Holocaust-era artwork and cultural items to their rightful owners. Holocaust victims and their heirs will be harmed, cruelly, irreparably, and unnecessarily. The majority will be left without recourse to resolve their meritorious claims, as traditional statutes of limitations, on the whole, do not adequately protect them given the special factors involved in investigating and addressing Holocaust-era claims.

SUMMARY OF ARGUMENT

CAR urges the Court to grant *certiorari* in this case because the constitutionality issue as decided by the Ninth Circuit likely will deny justice to a large class of Holocaust claimants whose families have been victimized and cheated through no fault of their own. California has the right, as does every state, to set its own statute of limitations for conversion claims, and may exercise this right to provide Holocaust victims and their families with an extended limitations period.

Such legislation is within an area of traditional State competence, and does not infringe on the Federal government's war powers generally, nor does it conflict with any specific federal program or policy. In fact, the Ninth Circuit's decision is counterintuitive. In its effort to avoid the appearance of a State policy intruding on an area dedicated to the Federal government, the Ninth Circuit overlooked a, if not the, key factor: California's desire to provide an extended statute of limitations for victims of Nazi-era looting aligns perfectly with the Federal government's stated policy that such claims should be resolved on their merits.

The Federal government has expressed that policy domestically and abroad. However, despite both the Federal government's established preference for merit-based resolution of these claims and the

guidelines for the conduct of Museums and Museum Directors set forth by The American Association of Museums ("AAM") and the Association of Art Museum Directors ("AAMD"), many U.S. museums continue to litigate Holocaust restitution claims by relying on technical defenses.

In the absence of specific Federal legislation addressing the issue, laws similar to California's § 354.3 that are passed by individual states to extend their statutes of limitations for Holocaust-related claims are the only way to ensure just and meritorious resolution of those cases.

ARGUMENT

I. States Have A Recognized Interest In Setting Their Own Statutes of Limitations For Various Claims, and § 354.3 Is No Different

The establishment of a statute of limitations for conversion of property is a traditional state function. States have a recognized interest in setting their own statutes of limitations for various claims and regulating property over which they have jurisdiction. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Section 354.3, which merely applies a state-specific statute of limitations concerning regulation of property to resident and non-resident parties that are otherwise subject to jurisdiction within the state, is wholly consistent

with the exercise of legitimate and traditional state interests. *Id.*

Contrary to the Ninth Circuit's finding in *von Saher*, § 354.3 does not "create[ ] a new cause of action," whether aimed at wartime wrongs or anything else. *See von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 966 (9th Cir. 2010). Instead, it simply extends the statute of limitations in certain property conversion cases, which is well within California's right to do.

Because the determination of an applicable statute of limitations presents a legitimate state interest, and falls within an area of traditional state competence, the Ninth Circuit never should have reached a field preemption analysis. *See Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 420 n. 11 (2003) ("If a state were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine..."); *see also von Saher*, 592 F.3d at 970-71 (Pregerson, J., dissenting).

Furthermore, since states traditionally have been responsible for establishing statutes of limitations for conversion of property, the Ninth Circuit's decision would leave victims of Holocaust art theft without any legislative relief from the unique circumstances which California has determined warrant extension of the standard statute of

limitations. Likewise, this decision will discourage other states from passing similar legislation aimed at assisting victims of Nazi looting.

II. The *von Saher* Ruling Will Have A Devastating Impact On Thousands Of Individuals

The United States is home to the third-largest Holocaust survivor population in the world. Keren Blankfeld Schultz, *For Many Holocaust Survivors, a Final Struggle*, COLUMBIA NEWS SERVICE, Oct. 30, 2007, *available at* http://jscms.jrn.columbia.edu/cns/2007-10-30/schultz-perpetualsurvivors.html. Thousands of these individuals have fought to locate and recover property stolen from themselves or their predecessors, or that they or their predecessors were forced to sell, as a result of the illegal and corrupt Nazi regime.

These claimants, through no fault of their own, are in a unique situation warranting an extension of the typical or standard statute of limitations applied in conversion cases. As an initial note, the owners of the art in question were, if they were "lucky," able to "voluntarily" flee their homes and businesses, often leaving valuables and records, if any, behind. If they were unlucky, they were physically evicted and rounded up by Nazi officials, and likewise forced to leave their possessions and papers behind. Similarly, records tracking the theft or subsequent

forced sale of the artwork at issue are frequently lost or nonexistent.

Another hurdle for pursuing these claims is the difficulty in finding witnesses. Some relevant witnesses may be living in foreign countries, if they even are able to be located. Others may have passed away. Many Holocaust survivors tried to ignore their terrible past and go on with their lives without looking back, only sharing stories and information with family later in life.

Locating looted art does not follow the typical sequence or timeline of most stolen property cases. It is time-consuming and expensive. A substantial amount of research is involved, and much of it must be conducted abroad. Many documents that claimants are able to locate need to be translated, which itself is a protracted process. Additionally, claimants often find they need to consult historical, art, and legal experts to conduct and analyze this research. This, too, adds to the expense and length of the search.

Moreover, for many years following the end of World War II, other historical events prevented searches and recovery of Nazi-looted artwork. The world was in the midst of the Cold War from World War II's conclusion until 1989, and generally "it was not until the collapse of communism that a serious effort commenced to identify artworks that still had not been returned to their rightful

owners." *See* J. Christian Kennedy, Special Envoy for Holocaust Issues, *The Role of the United States in Art Restitution*, Remarks at the Conference in Potsdam, Germany (Apr. 23, 2007), http://germany.usembassy.gov/kennedy_speech.html. Thereafter, archives that had been secret became publicly available for research.

Following the 1998 Washington Conference on Holocaust Era Assets, however, governments, along with private organizations and individuals, began to acknowledge that prior restitution efforts had been inadequate. CAR has been instrumental in lobbying for legislative and policy changes to reflect this shift in perspective.

Applying a typical statute of limitations to restitution claims for Nazi-looted art fails to recognize that these thefts and forced sales were undertaken by one of the most profoundly unlawful regimes the world has ever known. Rather, it prevents justice for the victims of said regime by allowing for the use of technical defenses against Holocaust victims and their heirs. Many of these claimants do not stand a chance of recovering their property if they are required to face a standard statute of limitations. Not only does a typical statute of limitations likely deny them such recovery, it also denies them the right to have their claim heard and resolved on the merits.

III. The Policy of the Federal Government Is That Holocaust Restitution Claims Should Be Resolved On The Merits, and § 354.3 Is Consistent With That Policy

The clearly articulated position of the United States Federal government is that looted Nazi-era property should be returned to its rightful pre-War owners, and that the use of technical defenses to combat the resolution of claims for restitution of this property should be discouraged. *See* Kennedy, *The Role of the United States in Art Restitution*. Rather, these claims should be resolved on the merits. As expressed by Ambassador Stuart Eizenstat, who represented the U.S. as the head of the U.S. delegation for the Prague Holocaust Era Assets Conference in June 2009:

> I am also concerned by the tendency of holders of disputed art to seek refuge in statutes of limitations and laches defenses in order to block otherwise meritorious claims even in situations where the claimant has not been provided with provenance information. Given the nature of the Holocaust and the Cold War that followed, many families simply were unaware or only partially aware of their heritage. The difficulty in getting documentation and the uncertain nature

> of the current restitution process creates further uncertainty. For a defendant to take advantage of circumstances totally beyond the control of the claimant compounds the grotesque nature of the original crime.

Eizenstat, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference.*

Most of the art claims brought in the U.S. involve a claimant on one side and a private museum, gallery, institution or individual collector on the other, and thus "the role of U.S. government has been limited..." Kennedy, *The Role of the United States in Art Restitution.* Furthermore, "[w]hile the government can urge institutions to participate voluntarily in programs such as the one sponsored by the Museum Association, the government does not have any leverage to force compliance..." *Id.* Because claims are almost exclusively brought against private organizations and individuals, "[t]his leaves no specific role for the federal government in the art restitution process. *Id.*

While the Federal government encourages a policy of meritorious claim resolution and the return of art to pre-War owners, it has not sought, or indicated an intention to seek, specific federal legislation to support that goal. Individual States may act within their traditional competence to pass legislation to discourage the use of statutes of

limitations defenses to prevent the adjudication of Nazi-looted art claims on the merits. Extending statutes of limitations for property conversion, which is a long-standing area of State responsibility, is one possible solution. Thus, § 354.3 both supports explicit Federal policy addressing the issue of Holocaust-era art, and is a permissible and constitutional vehicle for California to achieve its goal of promoting meritorious resolution of Holocaust-related art restitution claims. *See von Saher*, 592 F.3d at 970-71 (Pregerson, J., dissenting).

CAR is prepared to lead a nationwide campaign for changes to statutes of limitations law aimed at accommodating this preference, expressed both by the U.S. government and the worldwide community of nations, but these changes must be made at the state level. To do this, CAR needs to seek state legislation that discourages the use of statutes of limitations as a defense in cases seeking restitution of Holocaust-era property. However, that mission will be impossible if the *von Saher* decision, which renders such legislation unconstitutional, is left to stand by the Supreme Court. Guidance from the Supreme Court on this issue is therefore critical.

IV. Technical Defenses Like Statutes of Limitations Should Not Be Used To Prevent Recovery Of Nazi-Looted Art

CAR has worked with governments worldwide to ensure that the recovery process is streamlined, and that Holocaust-related art restitution claims are decided on the merits, rather than on technical legal defenses, such as statutes of limitations or laches arguments. *See* Commission for Art Recovery, Mission Statement, http://www.commartrecovery.org/mission.php. There is a wide consensus among international governments and institutions acknowledging that claimants requesting return of Nazi-looted art should receive just resolutions. Indeed, the U.S. has made clear over the last decade that it, too, espouses this policy.

The U.S. State Department, in conjunction with the United States Holocaust Memorial Museum, convened the 1998 Washington Conference on Holocaust Era Assets, where the 44 participating nations, including the U.S., agreed upon and adopted the Washington Conference Principles on Nazi-Confiscated Art. These non-binding Principles dictate that "steps should be taken expeditiously to achieve a just and fair solution" when pre-War owners of Nazi-looted art can be identified. *Washington Conference Principles on*

Nazi-Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/122038.htm.

The Washington Conference served to shed a much-needed spotlight on the issue of Holocaust-era art, so much so that "[i]mmediately following the conference, we saw more positive action by nations on this issue in the last six months than at any time since 1950." J.D. Bindenagel, *Washington Principles on Nazi-confiscated Art: Ten Years and Promises of the Washington Principles*, Holocaust Era Assets Conference Prague and Terezin, Czech Republic (June 26-30, 2009), http://www.commartrecovery.org/docs/bindenagel.pdf.

More recently, the U.S. has signed on to the Terezin Declaration on Holocaust Era Assets and Related Issues, which was adopted at the 2009 Prague Conference and endorsed by 46 nations. As an initial matter, the Terezin Declaration:

> Recogniz[es] that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists, and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the

> Holocaust era between 1933-45 and as an immediate consequence,...

Terezin Declaration on Holocaust Era Assets and Related Issues (June 30, 2009), http://www.state.gov/p/eur/rls/or/126162.htm.

Drawing on the support of, commitment to, and experience gained since, the Washington Conference Principles on Nazi-Confiscated Art, the Terezin Declaration pointedly:

> [U]rge[s] all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties.

Id.

Through the Terezin Declaration, the U.S. government thus reiterated the central tenet of its commitment to resolve Holocaust-era art claims in an expeditious and just manner: to wit, addressing only the merits of such claims.

The AAMD and the AAM also provide their members with non-binding ethical guidelines relating to Nazi-era objects. *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933 – 1945)* (June 4, 1998, Amended Apr. 30, 2001), http://www.amd.org/papers/guideln.php; *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era* (Approved Nov. 1999, Amended April 2001), http://www.aam.us.org/museumresources/ethics/nazi-guidelines.cfm. The AAM's guidelines specifically acknowledge that museums "may choose" to forego technical defenses when faced with Holocaust restitution claims. *Id.*

Many museums, however, do not choose to forego these defenses, and CAR is concerned that museums are not acting properly to ensure that Nazi-looted art is returned to rightful owners. As Ambassador Eizenstat has noted:

> Some holders of artworks have not honored the [Washington] Principles and have gone to great lengths to retain objects in the face of facially valid claims. In the United States, declaratory judgments are being used to make it more difficult for claimants to prove their ownership. Other holders of art have simply refused to consider claims, thereby forcing the claimants either to give up

their claims or engage in expensive and difficult legal proceedings.

Eizenstat, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference*.

Ambassador Bindenagel has expressed similar distress over the treatment of Holocaust-related claims by U.S. museums and Courts. *See* Bindenagel, *Washington Principles on Nazi-confiscated Art: Ten Years and Promises of the Washington Principles*.

The AAM has not been completely ineffectual. To help promote its guidelines, the AAM has taken the positive step of setting up a portal linking websites of major U.S. museums that have posted the provenance of their possessions known to have changed hands between 1933 and 1945 in Europe. *See* Nazi-Era Provenance Internet Portal at www.nepip.org ("NEPIP"). However, this system is imperfect. *See* Kennedy, *The Role of the United States in Art Restitution*. Not all museums are members of the AAM or participate in the NEPIP. A particularly notable exception is the Norton Simon Museum. *See* American Association of Museums, List of Accredited Museums, http://www.aam.us.org/museumresources/accred/list.cfm; *see also* NEPIP Participating Museums, http://www.nepip.org/public /search /museum.cfm?action=mussearch&menu_type=search. A recognized gap in the NEPIP system is that many smaller museums

have not submitted provenance data for their collections, claiming the research cost is too high. Kennedy, *The Role of the United States in Art Restitution*. The U.S. government "strongly supports" efforts by the AAM "to close that gap." *Id.*

As of April 2007, the portal contained 25,424 objects from 155 museums. Kennedy, *The Role of the United States in Art Restitution*. The portal currently includes 28,141 pieces of art owned by 168 U.S. museums. See "Project Status" section on NEPIP Home Page, http://www.nepip.org. Approximately 9,500 have been added since July 2006. *See* Kennedy, *The Role of the United States in Art Restitution* (approximately 7000 works were added between July 2006 and April 2007); *see also* NEPIP Home Page, www.nepip.org (28,141 works currently listed in portal).

Clearly, research into these works is ongoing, and many claimants might not learn the location of a particular artwork until it is posted on the portal. Unfortunately, just because a particular piece has not been posted on the portal until recently does not insulate a claimant from a statute of limitations defense, or from losing in the courtroom on the basis of that defense. For example, the Detroit Institute of Arts and the Toledo Museum of Art both maintained statutes of limitations defenses against individuals seeking the return of Nazi-era artwork, even though those claimants

only gained actual awareness that the museums possessed the art in question after finding the works listed on a website. *See Detroit Institute of Arts v. Ullin*, No. 06-10333, Memorandum Opinion and Order of Hon. Denise Page Hood, Dkt. 36, slip op. at 4-6 (E.D. Mich. S. Div. Mar. 31, 2007) and *Toledo Museum of Art v. Ullin*, 477 F. Supp.2d 802, 805-08 (N.D. Ohio 2006).

In both of these cases the museums argued, and the respective courts held, that the claims of ownership were barred by the applicable statute of limitations because the claimants or their predecessors reasonably should have discovered the whereabouts of the paintings at issue well before the museums posted information about the works. *See Detroit Institute of Arts*, slip op. at 6 (finding that claim to painting accrued in 1938, and that even if discovery rule were applied, claim would have accrued in 1973 because claimant's predecessors "'through the exercise of reasonable diligence should have discovered' that they had a possible cause of action to recover the Painting."); *Toledo Museum of Art*, 477 F. Supp.2d at 808 ("no matter what date is selected [for the running of the statute of limitations]...Defendants' claims are time barred well before their filing in 2006.").

AAM has been made aware of problems with the repeated use by U.S. museums of technical defenses to Holocaust-related restitution claims, and the concerns that such behavior has raised.

For example, on October 20, 2009, Wesley A. Fisher, the Director of Research for the Conference on Jewish Material Claims Against Germany, Inc. wrote to AAM President Ford W. Bell, requesting the AAM to revise its Guidelines to reflect the principles articulated in the newly-adopted Terezin Declaration. *See* Letter from Wesley A. Fisher, Director of Research, Conference on Jewish Material Claims Against Germany, Inc., to Ford W. Bell, President, AAM (Oct. 20, 2009), Appendix A, attached. Mr. Fisher pointed out that the AAM's stance is that relying on technical legal defenses, such as statutes of limitations, is appropriate, and even a museum's "obligation," when presented with "non-meritorious" claims. *Id.* at 2. Unsurprisingly, Mr. Fisher further explained that he was:

> [G]reatly troubled by the idea that museums should assign to themselves the role of determining whether a particular claim has merit, instead of submitting that determination to a court of law or other neutral arbiter. This strikes at the very heart of the principles adopted by the forty-six nations in Prague, not to mention our system of justice, as well as the AAM's stated desire to have claims determined on the merits. In no case should the museums – or for that matter, the claimants – appropriate to themselves the power to determine the merits of a case. Moreover, we do not see how a museum could ever be obligated to

> keep in its collection a work that bears the taint of Holocaust-related events based solely on technical defenses that do not go to the factual merits of a claim.

Id.

The Detroit Institute of Arts and Toledo Museum of Art are not the only U.S. museums in recent memory that have stopped good-faith negotiations to instead bring declaratory judgment actions to quiet title to works in their collections.

In *Schoeps v. Museum of Modern Art*, the Museum of Modern Art and the Solomon R. Guggenheim Foundation filed a declaratory judgment action to quiet title as to two Picasso paintings being claimed by the heirs of Paul von Mendelssohn-Bartholdy, a German of Jewish descent. *Schoeps v. Museum of Modern Art*, 594 F. Supp.2d 461, 463 (S.D.N.Y. 2009). Before the court was able to reposition the parties "to more accurately reflect" their positions, the Museums had moved for summary judgment based on laches, choice of law questions, and a technical argument that the claimants were not permitted to bring conversion and replevin claims "without first having been appointed as representatives of the relevant estate by the New York Surrogate," despite the fact that their own witness testified that the concept of an "estate" does not exist under German law – which the Museums otherwise had argued governed the relevant causes

of action. *Id.* at 463, 465-68. Fortunately for the *Schoeps* claimants, the Museums' motion for summary judgment was denied, *id.* at 468, and the parties entered into a confidential settlement on the eve of trial. *See* Lindsay Pollock and Philip Boroff, *Judge Slams MoMA, Guggenheim on Secret Holocaust Art Agreement*, June 18, 2009, *available at* http://www.bloomberg.com/apps/news?pid=20601088&sid=ayZK6G30lMfU.

By contrast, the claimant in *The Museum of Fine Arts, Boston v. Seger-Thomschitz* did not fare so well. In that case, the Museum moved for a declaratory judgment seeking to quiet title to a painting by Oskar Kokoschka, and moved for summary judgment, arguing that Dr. Seger-Thomschitz's claims were time-barred. *The Museum of Fine Arts, Boston v. Seger-Thomschitz*, Civ. Action No. 08-10097-RWZ, Memorandum of Decision and Order of Hon. Rya W. Zobel, Dkt. 59, slip op. at 1-2 (D. Mass. May 28, 2009).

Such assertions by museums do not harmonize with the stated Principles in the Terezin Declaration, and with the U.S. government's explicit position that Holocaust-era restitution claims should be resolved on their merits. Claimants deserve at least a day in court to have their allegations decided on the facts, whether or not the outcome is in their favor.

CONCLUSION

California's § 354.3, and the policy behind it, is supportive of the Federal position that Holocaust restitution claims should be resolved on their merits. This statute does not encroach on the Federal government's foreign affairs or war powers, and both the absence of a conflicting federal policy and the existence of a legitimate state interest in an area traditionally regulated by the states, meaningfully differentiate it from the provision reviewed and found unconstitutional by the Court in *Garamendi*. The Ninth Circuit's decision instead resounds in inconsistency when finding that a claim for Holocaust-era assets may be pursued within California's existing, traditional, statute of limitations without infringing on federal war powers, yet becomes an imposition on those war powers when that same claim is permitted to be pursued under an extended statute of limitations.

States should be encouraged to pass legislation limiting the use of technical defenses against Holocaust claims, consistent with the Federal policy of meritorious resolution of such claims. While such legislation will enable Holocaust claimants to get into court without facing technical defenses, it will not mean an automatic victory for every plaintiff. Indeed, there may well be many instances where plaintiffs will lose their cases even without the bar of statutes of limitations or other technical defenses commonly used. This does not

mean, however, that those claimants should be deprived of the right to have their claims heard and resolved on the merits.

An opportunity for recovery through California's determination of which statute of limitations to apply to property conversion cases presented in its courts has nothing to do with federal power over foreign policy – and everything to do with recognition of reality.

For all of the foregoing reasons, Petitioner Marei von Saher's petition for writ of *certiorari* should be granted.

Respectfully Submitted,

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October 20, 2009

Mr. Ford W. Bell, DVM
President
American Association of Museums
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Washington, DC 2005
fbell@aam-us.org

Dear Mr. Bell,

I write to you after consultation with the Commission on Art Recovery and a broad range of experts in the field of art law, as well as after the State Department Town Hall Meeting to Review the Implementation of the Terezin Declaration Provisions Relating to the Restitution of Nazi-Confiscated Art held on September 22, 2009.

At the Holocaust Era Assets Conference held June 26-30, 2009 in Prague and hosted by the Czech Republic as part of its Presidency of the European Union, the forty-six countries in attendance – including the United States – reviewed the progress made since the 1998 Washington Conference on Holocaust-Era Assets and the adoption at that time of the Washington Conference Principles on Nazi-Confiscated Art. They then approved the Terezin Declaration, a copy of which is attached. The text of the Declaration may also be found on the website of the Prague Conference at http://www.holocaustera.assets.eu

We have previously brought to the AAM's attention problems with the use by American museums of technical defenses, such as the statute of limitations and the doctrine of laches, when faced with Holocaust-related claims (attached for your convenience are copies of our letter to you dated May 21, 2008 and of your response dated June 19, 2008). We would like to return to the subject in view of the Terezin Declaration.

In the section of the Declaration entitled "Nazi Confiscated and Looted Art," the forty-six states reaffirm support of the Washington Conference Principles on Nazi-Confiscated Art and "encourage all parties including public and private institutions and individuals to apply them as well." We particularly call your attention to point 3 of the section, which focuses on the need for claims to be decided on the merits, as opposed to other bases: "Keeping in mind the Washington Conference Principles on Looted Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved

expeditiously and based on the merits and facts of the claims and all the relevant documents submitted by all parties."

In his keynote address at the Prague Conference, Ambassador Stuart Eizenstat made pointed reference to the use of technical defenses to avoid a resolution of looted art claims "on the merits": "I am . . . concerned by the tendency for holders of disputed art to seek refuge in technical defenses to avoid potentially meritorious claims, including statutes of limitation . . . ."

In your letter of June 19, 2008, you took the position that invoking such legal defenses was appropriate – indeed, a museum's "obligation" as you put it -- when faced with a "non-meritorious claim." Representing the AAM at the recent State Department Town Hall Meeting, Erik Ledbetter repeated this position and stated that most claims against U.S. museums have been settled by the museums and that technical legal defenses have been used only where U.S. museums have concluded that the claims are without merit.

We are greatly troubled by the idea that museums should assign to themselves the role of determining whether a particular claim has merit, instead of submitting that determination to a court of law or other neutral arbiter. This strikes at the very heart of the principles adopted by the forty-six nations in Prague, not to mention our system of justice, as well as the AAM's stated desire to have claims determined on the merits. In no case should the museums -- or for that matter, the claimants -- appropriate to themselves the power to determine the merits of a case. Moreover, we do not see how a museum could ever be obligated to keep in its collection a work that bears the taint of Holocaust-related events based solely on technical defenses that do not go to the factual merits of a claim.

As we noted at the State Department Town Hall Meeting, we are greatly appreciative of the efforts of the AAM and of American museums to deal with the question of Nazi-confiscated art. However, even settlements between museums and claimants do not always represent a resolution based on the facts and the merits of a case, let alone court decisions reached based on technical legal defenses.

The consensus at the State Department meeting was to move in the direction of establishing ways in which fact-finding and research in each case could initially be submitted to some form of neutral commission so as to avoid time-consuming and expensive litigation, especially in those cases where either side believes that its position is clearly correct and can be easily established.

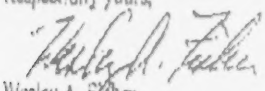
Whether or not such a commission is eventually established, we request that the AAM change its "Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era" to reflect the principles adopted in Prague. Specifically, we suggest that point 4f of the Guidelines be changed. At present that point reads as follows: "AAM acknowledges that in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses." We suggest that this language be changed to read something like the following: "In order to achieve an equitable and appropriate resolution of claims, museums should waive available technical defenses

including defenses concerning the passage of time such as statutes of limitations and the doctrine of laches, and doctrines of good faith acquisition and adverse possession based on foreign laws of prescription or otherwise."

Thank you for your attention to this matter.

With best personal regards,

Respectfully yours,



Wesley A. Fisher
Director of Research

Cc:
Mr. Carl R. Nold, Chair of the Board, AAM
[illegible]

Dr. James A. Welu, Chair Accreditation Commission, AAM
[illegible]

Mr. Erik Ledbetter, Director of International Programs, AAM
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Mr. Charles A. Goldstein, Counsel, Commission for Art Recovery
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